

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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BETCO CORPORATION,

Plaintiff,

-vs-

Case No. 14-CV-193-WMC

MALCOLM PEACOCK and MARILYN
PEACOCK, B. HOLDINGS, INC.
and E. HOLDINGS, INC.,

Madison, Wisconsin
June 15, 2015
8:30 a.m.

Defendants.

* * * * *

STENOGRAPHIC TRANSCRIPT OF FIRST DAY OF COURT TRIAL
HELD BEFORE CHIEF JUDGE WILLIAM M. CONLEY,

APPEARANCES:

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2 For the Defendants:

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3 BY: ALBERT BIANCHI

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1 (Proceedings called to order.)

2 THE CLERK: Case Number 14-CV-193-WMC. *Betco*
3 *Corporation, Limited v. Peacock, et al.* called for the
4 first day of court trial. May we have the appearances,
5 please.

6 MR. JACKSON: Your Honor, may it please the
7 Court. Reginald Jackson of Connelly, Jackson, Collier
8 of Toledo, Ohio, on behalf of the plaintiff. With me is
9 Tim Nackowicz with the Toledo firm of Allotta and
10 Farley, he was formerly with our firm; Dave Moore with
11 Nowlan and Mouat of Janesville, and Sara Gehrig, the
12 same firm for the plaintiff. Thank you.

13 THE COURT: Very good. For the defendant.

14 MR. BIANCHI: For defendants, Albert Bianchi
15 and Mary Turke of Michael, Best & Friedrich. And also
16 seated with us here is my client Malcolm Peacock.

17 THE COURT: Very good. I indicated at the
18 outset that I would appreciate a short statement,
19 although I have now had the benefit of the briefs from
20 both sides and I will leave to each side what statement
21 they wish to make to begin.

22 MR. JACKSON: Thank you, Your Honor. First, on
23 behalf of the plaintiff we would thank the Court for
24 allowing this matter to proceed to trial, and hopefully
25 for Mr. Betz and for Mr. Peacock to proceed to a

1 conclusion of this matter that has gone on for some
2 three years.

3 We understand the Court has taken considerable time
4 and effort to understand this dispute and we thank the
5 Court for narrowing the issues. We expect to move
6 through the evidence appropriately and efficiently. We
7 understand the Court's instruction to be completed
8 within five days and we believe that we can meet that
9 expectation.

10 As background, and I hope I'm not being redundant,
11 but we're talking about a company located in Beloit,
12 Wisconsin, which produces bioaugmentation products.
13 They come in forms of liquid, extruded products, gel,
14 and powdered products, and their application is for the
15 treatment of water and wastewater, and many of the
16 end-use producers -- I'm sorry, customers are wastewater
17 treatment facilities which are regulated by the federal
18 and state EPA.

19 I would like to give the Court a brief outline of
20 what we expect the evidence will be. We understand the
21 Court's instruction that we are focused on the period
22 between the time of the purchase of the operation and
23 the time that Mr. Peacock left. That is a period
24 between September 2010 and November 2011 when Mr. Betz,
25 on behalf of Betco, told Mr. Peacock that he would

1 remain in the role as a consultant; that he was free to
2 go home, they would continue to pay him, and they did
3 until April of 2012 when certain matters came to light
4 which we will present which caused Betco to terminate
5 the services of Mr. Peacock.

6 The evidence will show that as part of his role,
7 Mr. Peacock wished to remain -- I'm sorry, as part of
8 the Asset Purchase Agreement, Mr. Peacock desired to
9 remain an employee for an additional two years, and in
10 fact, stayed on. Pursuant to an employment contract,
11 Mr. Peacock was president. There will be testimony, you
12 will hear, as to Mr. Peacock's role. He was expected to
13 continue the operation of the Beloit facility as he had
14 done for some 20 years. By all appearances to Betco,
15 Mr. Peacock was running an efficient, profitable
16 operation. Certain matters came to light after
17 Mr. Peacock left and it is that -- those matters which
18 are the subject of the Court's review.

19 The evidence will further show that during this
20 relevant time period, employees in Beloit were concerned
21 that the people in Toledo, Betco, were not aware that
22 product was being shipped without being tested; that
23 some product was not tested at all; that some product
24 was tested after it was shipped as opposed to before it
25 being shipped, and that certificates of analysis, which

1 you'll hear more about, were being made up or falsified
2 and deceiving the customers.

3 The evidence will further show that Mr. Peacock
4 suppressed the Beloit employees from conveying this
5 information to the people in Toledo; that he asked
6 Mr. Betz to keep the Toledo people out of the Beloit
7 operation, do not meddle in his operation, and that
8 Mr. Betz complied with that.

9 The evidence will show that Mr. Betz -- I'm sorry,
10 Mr. Peacock instructed the employees in Beloit not to
11 speak to the people in Toledo. The evidence will show
12 that for the 15 months while Mr. Peacock was in charge,
13 that by his words and actions he concealed what -- from
14 Betco what he knew to be true; that he instructed his
15 employees not to test liquid product; extruded products
16 were not tested; powder products were shipped, sometimes
17 tested, sometimes not. Sometimes if the label or the
18 specification count was not appropriate, nothing was
19 done about the product. And significantly, customers
20 who requested certificates of analysis were told that an
21 analysis or a test occurred; they were told that -- the
22 results of the analysis, and no one who produced or
23 generated the certificate of analysis was aware of any
24 test or of any result.

25 In sum, we believe this violates and is a breach of

1 the duty of good faith and fair dealing. We believe
2 that Mr. Peacock breached a promise made in the Asset
3 Purchase Agreement. And I quote from Section 4.19 that
4 he warranted to Betco that "each item processed or
5 delivered by seller has been in conformity with all
6 applicable contractual commitments and all express and
7 implied warranties." And we believe the evidence will
8 show that it was not, that he knew it, and that once
9 Mr. Peacock left on we believe good terms as a
10 consultant, that employees in Beloit who were no longer
11 in fear of their jobs for retaliation came forward.

12 2012, Betco began to or the Beloit operation began
13 to identify what the problem was. In 2013 it continued,
14 and 2014 and 2015 were spent fixing the problem. The
15 problem was fixed by the abandonment of a failed process
16 and the increased and unexpected expense of purchasing
17 bacteria to process and deliver items in conformity with
18 contractual commitments and express and implied
19 warranties.

20 In sum, Betco did not get what Betco paid for. The
21 business had a value and we recognize that it had a
22 value, but it did not have the value as represented by
23 the financials, by the financial statements which failed
24 to state the true level of expenses necessary to produce
25 a product without deception to customers. Thank you.

1 THE COURT: Thank you, Mr. Jackson. And I'll
2 now hear from defendant. (8:40 a.m.)

3 MR. BIANCHI: Good morning. And may it please
4 the Court. Buyer's remorse is often described as an
5 emotional response on the part of a buyer in a sales
6 transaction which may involve feelings of regret, fear,
7 depression or anxiety. These feelings we all have
8 experienced at some time or another. The best way to
9 avoid or at least cope with buyer's remorse is to be
10 well informed. However, once informed, it is up to the
11 buyer to take that information and to use it.

12 Ignore that information and those fears and
13 regret-filled emotions begin to swell. Here, within a
14 year of the purchase, Betco was well informed about
15 Bio-Systems and all of its processes. Mr. Peacock
16 concealed nothing, giving Betco access to all
17 procedures. But Betco ignored the information it
18 received.

19 Now disgruntled with its failure to both appreciate
20 Mr. Peacock's pre-sale disclosures and its failure to
21 seek expertise on production issues prior to the
22 expiration of contractual warranties, Betco now blames
23 Mr. Peacock for Betco's decision under the guise that
24 Mr. Peacock concealed material information post-sale.
25 But the evidence will show that Betco was aware of all

1 the alleged issues of which it now complains.

2 Betco's position is a classic example of buyer's
3 remorse. Indeed from the beginning of this three-year
4 litigation, the Peacocks have maintained that this is
5 simply a case of buyer's remorse and thus they can't be
6 held liable under the law. Although the scope of the
7 case has been significantly reduced to only a claim for
8 breach of good faith and fair dealing against
9 Mr. Peacock, it remains at its core a case of buyer's
10 remorse.

11 The duty of good faith and fair dealing is founded
12 on honesty and reasonableness. The evidence here will
13 show that Mr. Peacock was both honest and reasonable in
14 not only presenting Bio-Systems' processes to Betco in
15 his responses to their questions or inquiries, but
16 specifically responding to those actual questions that
17 they posed about the company's processes.

18 The problem and what the evidence will also show is
19 that Betco was not honest or reasonable with
20 Mr. Peacock. Betco never presented to Mr. Peacock the
21 issues that it has allegedly found with Bio-Systems'
22 processes. Betco hid these concerns from Mr. Peacock,
23 even though it was aware of the concerns six months
24 after the purchase of the company and six months before
25 it paid Mr. Peacock the reserve amount that was in

1 escrow in accordance with the EPA. Indeed if Betco had
2 raised these issues with Mr. Peacock as it should have
3 under the warranty provision in the APA, it could have
4 discussed with them any concerns and even been able to
5 explain the reasoning behind his various processes which
6 were the same processes that had brought -- brought
7 Bio-Systems its success for the last 20 years.

8 The law in Wisconsin is clear that it is not a
9 breach of the duty of good faith if a course of action
10 available to Betco could have avoided the harm, and this
11 course was not followed. The evidence will show that
12 within one -- within the one-year period in which Betco
13 could bring warranty claims under the Asset Purchase
14 Agreement, Betco was aware of all the issues it alleges
15 to have with Bio-Systems.

16 For example, Betco points to having to replace
17 boilers as an item that demonstrates this breach of duty
18 of good faith and fair dealing. However, the evidence
19 will show that not only did Mr. Peacock honestly discuss
20 the boiler issue with Betco, but Betco started the
21 process of replacing the boilers before it paid
22 Mr. Peacock the reserve fund out of escrow. Thus, if
23 Betco believed replacement of the boilers to be
24 something that they should have sought reimbursement for
25 from Mr. Peacock as a breach of warranty under the APA,

1 they could have taken the cost of the project out of the
2 escrow fund. But Betco didn't do this and yet now it
3 wants to come back and argue that Mr. Peacock is liable
4 for those costs.

5 Another example of Betco's failure to take the
6 course of action to avoid the harm is evidenced in
7 Betco's CFO, Tony Lyons, who testified at his deposition
8 that he was also the person in charge of pursuing legal
9 issues for Betco. And he stated that although he
10 personally was not aware of the allegation that
11 Bio-Systems was consistently producing product under
12 specification and shipping it to customers, that Betco
13 as an organization was, in fact, aware of that issue in
14 March of 2011. Indeed you will see a memo that
15 memorializes this March 15, 2011, visit to Bio-Systems
16 by Betco personnel and it contains in detail every issue
17 of which Betco now complains. Such issues should have
18 and could have been addressed with Mr. Peacock within
19 the APA's one-year warranty period. But Betco failed to
20 follow that course of action.

21 An email that was sent to Mr. Peacock regarding
22 this March 2011 visit did not contain all the issues in
23 the Betco memo. Instead of talking to Mr. Peacock,
24 Betco simply fired him and then personnel continued to
25 alter the processes that had served Bio-Systems for more

1 than two decades. Betco cannot now, upon feeling
2 regret, try to hold Mr. Peacock liable for issues it
3 could have avoided, and in some instances, it created.

4 The evidence will also show that Mr. Peacock was
5 completely transparent about the procedures at
6 Bio-Systems. One of the procedures Mr. Peacock honestly
7 shared with Betco about was the method that he used to
8 plate and count bacteria. There will likely be much
9 talk about what method of plating and counting bacteria
10 is best, but such talk completely misses the point.

11 Instead the point and what the evidence will show is
12 that Mr. Peacock freely told anyone, not just Betco, but
13 all Bio-Systems' customers that Bio-Systems used a
14 spiral plater and a ProtoCOL counter to plate and count
15 bacteria. In fact, Bio-Systems encouraged customers to
16 come into the Beloit plant to see how Bio-Systems plated
17 and counted its bacteria.

18 The evidence will show that Mr. Peacock correctly
19 believed that Bio-Systems' plating and counting methods
20 were not only sound and valid, but he found them to be
21 an improvement over past methods, including doing what
22 is referred to as a pour plate and manual count of
23 bacteria.

24 While Betco may be feeling anxious about the
25 methods that Bio-Systems used to plate and count

1 bacteria, such feelings do not create a breach of good
2 faith by Mr. Peacock because the methods which are
3 accepted and used by other companies were available for
4 everyone, including Betco, to examine at any time.

5 Betco has also challenged some of the fermentation
6 methods that Bio-Systems used when Mr. Peacock owned the
7 company. Again, Betco will likely come forward with
8 statements about how the process does not allegedly work
9 as Betco had initially thought them to. But the
10 evidence will show that the processes that allegedly do
11 not work are not the same as those that were
12 successfully used for 20-plus years by Mr. Peacock when
13 he owned Bio-Systems. And regardless of the parties'
14 disagreement over the validity of the processes, the
15 evidence will also show that upon purchasing
16 Bio-Systems, Betco was given the ISO Manual which
17 contained the exact processes of which Betco now
18 complains. In other words, within weeks after
19 purchasing the company, Betco knew the processes being
20 used to ferment bacteria at the Beloit plant. Thus
21 nothing was stopping Betco from examining those
22 processes right from the beginning.

23 Even though Mr. Peacock provided Betco with this
24 information on Bio-Systems' processes right away, Betco
25 waited almost two years to examine those processes and

1 after that even began to change them. Mr. Peacock's
2 actions were not a breach of the duty of good faith and
3 fair dealing. Instead Betco is now simply looking to
4 pass the buck because it wants what it has decided are
5 better processes such as sprays or free-drying bacteria.
6 However, Betco purchased a company that used solid state
7 fermentation and that is what it's entitled to.

8 The evidence will show that Mr. Peacock was also
9 honest about Bio-Systems' products and processes with
10 Bio-Systems' customers. Before the sale of Betco in
11 2010, Mr. Peacock had been running the business
12 successfully for over 20 years using the processes Betco
13 now challenges. The success of Bio-Systems was built on
14 repeat customers. Thus, if Mr. Peacock was not honest
15 about his products to his customers, then he would have
16 lost those customers and the business would never have
17 grown as it did.

18 The Court has already reviewed the testimony of
19 Bio-Systems' customers in the form of deposition
20 designations. Those statements establish that the
21 customers were satisfied with not only Mr. Peacock and
22 his technical assistance, but with Bio-Systems' products
23 and their effectiveness. Indeed the Court will see that
24 what is entirely absent from the evidence that's going
25 to be presented are customers having major quality

1 issues with Bio-Systems' products when Mr. Peacock owned
2 the company. Also absent are any claims or even a
3 threat of a claim by a customer against Bio-Systems for
4 producing products and selling them not in conformity
5 with the provided specifications. Not a single claim.

6 What the evidence will show is that even customers'
7 minor product issues were quickly resolved by
8 Mr. Peacock to the customers' satisfaction. Thus, while
9 Betco complains about the quality of the products
10 produced at the Beloit plant, there is simply no
11 evidence of comparable unresolved customer complaints.

12 Indeed one customer was Mr. Peacock's other company
13 which was initially -- he was attempting to sell with
14 Bio-Systems United States and that's Bio-Systems in the
15 United Kingdom. It regularly purchased and resold
16 products that were manufactured at the Beloit plant. So
17 the question arises if the products were not up to
18 specification, then one would have expected Mr. Peacock
19 to have Bio UK buy its bacteria from a different
20 company. But Bio UK continually and regularly bought
21 products from Bio-Systems' Beloit plant.

22 Mr. Peacock also dealt with customer issues they
23 might have with that same honesty and integrity that he
24 spoke to with Betco. For example, if we return to the
25 bacteria count momentarily, whenever a customer asked

1 Mr. Peacock about the bacteria count on the products, he
2 freely shared the methods Bio-Systems used to plate and
3 count the bacteria and he would invite the customer or
4 the distributor to come and examine the processes, and
5 then he was ready to further explain why he believed the
6 Bio-Systems' methods were better than those used by its
7 competitors.

8 So Betco purchased a small bacteria-producing
9 business that had become fairly successful over the last
10 20 years using procedures and processes that Mr. Peacock
11 helped institute. What Betco did not purchase was a
12 large bacteria company that had spent additional
13 capital, millions of dollars to use freeze or
14 spray-drying processes. Simply put, Betco got exactly
15 what it was offered and what it decided to buy. Betco's
16 post-sale remorse for not being a bacteria business that
17 uses more expensive bacteria-producing processes does
18 not transform any of Mr. Peacock's actions into a breach
19 of his duty of good faith and fair dealing.

20 So the evidence will show that shortly after the
21 purchase, Mr. Peacock suggested that Kurt Bischoff,
22 Betco's senior manager member tasked with understanding
23 the processes and procedures used at Bio-Systems, he
24 suggested that Kurt spend at least a week at the Beloit
25 plant to better understand the processes and procedures

1 and to even discuss any changes that he thought were
2 warranted. But according to Mr. Bischoff, Bio-Systems
3 was only one of many projects he was working on for
4 Betco. And so being very busy in 2011, he was unable to
5 devote the time needed to properly understand
6 Bio-Systems' processes until some time in 2012. Indeed,
7 Mr. Bischoff only visited the plant a day here or a day
8 there, never the full week that Mr. Peacock suggested.

9 Betco even had an expert consultant, Mr. Barry
10 King, on retainer to be able to examine and investigate
11 the procedures used at Bio-Systems immediately upon
12 purchase. But Mr. King never inspected the Beloit
13 plant. Indeed Mr. Bischoff admitted that not having
14 Mr. King inspect the plant was a mistake. No matter how
15 much Betco would like it to be true, its mistakes and
16 failures are not breaches of a duty of good faith by
17 Mr. Peacock.

18 Additionally, the evidence will show that in the
19 year he was employed with Betco, Mr. Peacock did not
20 take any action to try to conceal from Betco information
21 about Bio-Systems' processes. Betco employees regularly
22 communicated with Bio-Systems' employees, both via email
23 and when Betco employees visited the Beloit plant. This
24 makes logical sense as Betco is the new owner and
25 Mr. Peacock had simply become another employee of Betco.

1 So he had no power to prohibit interactions between
2 Betco personnel and Bio-Systems' employees.

3 Also while Mr. Peacock generally was overseeing
4 employees at the Beloit plant, he was not inspecting all
5 their work daily but instead relying on his area
6 managers, sales, production, and the lab; in other
7 words, he believed that if an employee had a problem
8 with equipment or a process, they would attempt to
9 resolve it themselves or bring it up the chain to their
10 supervisor and that the employees would follow the
11 procedures listed in Bio-Systems' ISO Manual and other
12 company directives. Thus, Mr. Peacock reasonably
13 expected and believed that the Beloit plant was running
14 according to Bio-Systems' documented procedures that had
15 brought it great success over the past 20 years. All
16 that information on Bio-Systems' procedures had been
17 provided to Betco again shortly after the purchase.

18 So in the end, the evidence will show that well
19 within the year of purchase, Mr. Peacock and other
20 employees of Bio-Systems freely shared with Betco the
21 various processes and procedures used at Bio-Systems.
22 The employees even shared some of their concerns.

23 The evidence will also show that Mr. Peacock
24 believed Bio-Systems' processes and procedures were
25 being properly followed and that they were valid and

1 successful as they had been for the past 20 years.
2 Despite all this, Betco still wants to hold Mr. Peacock
3 liable for its failure to take that information that it
4 was provided and make sure it knew what it had
5 purchased. This Betco cannot be allowed to do.

6 Mr. Peacock is not responsible, let alone liable
7 for Betco's now feelings of buyer's remorse. Betco was
8 simply not denied the benefit of what it bargained for.
9 In fact, it received exactly what Mr. Peacock offered.
10 While Betco may now regret that purchase of the business
11 that it little understood, the regret does not translate
12 into liability, and accordingly, at the end we will ask
13 that upon the hearing of all the evidence presented, the
14 Court find that Mr. Peacock did not breach his duty of
15 good faith and fair dealing in performing the Asset
16 Purchase Agreement.

17 THE COURT: Thank you, Mr. Bianchi. And now I
18 will hear the first witness for the plaintiff.

19 MR. JACKSON: Your Honor, we'd call Robert
20 Reich. Mr. Nackowicz will be handling this. Mr. Reich
21 is called somewhat out of order. I discussed this with
22 Mr. Bianchi.

23 THE COURT: That's fine.

24 MR. JACKSON: He has to travel.

25 THE COURT: If you would, Mr. Reich, come

1 straight forward and just stand before the court
2 reporter to be sworn.

3 **ROBERT REICH, PLAINTIFF'S WITNESS, SWORN,**

4 MR. NACKOWICZ: Can everyone see it's the first
5 page of Mr. Reich's CV?

6 THE COURT: If you look, Counsel -- and
7 everyone is going to have to become familiar with this.
8 You can see down on your right the light is on for
9 everyone except a jury. It is not disclosed to the
10 audience because I don't know what confidentiality
11 applies, but to the extent that you wish that, you'll
12 need to hit that last light.

13 MR. NACKOWICZ: Thank you, Your Honor.

14 THE COURT: That's fine. You can proceed now.
15 Thank you.

16 DIRECT EXAMINATION

17 BY MR. NACKOWICZ:

18 Q Mr. Reich, please state your name and address.

19 A Robert Reich. 561 Jennifer Lane. Grayslake,
20 Illinois.

21 Q What is your profession?

22 A I am a microbiologist.

23 Q So you're a scientist.

24 A Yes.

25 Q Are you employed?

ROBERT REICH - DIRECT

1 A Yes.

2 Q Where are you employed?

3 A I work for a company called LexaMed in Toledo,
4 Ohio.

5 Q What is your title?

6 A President.

7 Q Do the LexaMed employees answer to you then?

8 A Yes.

9 Q And do they perform tasks at your direction?

10 A Yes. Or people that report to me's direction.

11 Q And what is LexaMed?

12 A LexaMed is a laboratory and consulting company
13 primarily to the pharmaceutical and medical device
14 industries.

15 Q And what is your educational background?

16 A I am a microbiologist, undergraduate and graduate
17 degrees.

18 Q Could you give me a brief thumbnail of your
19 professional experience.

20 A Out of school I worked for an American canning
21 company where I was doing research into food-borne
22 diseases and processes to aseptically -- or not
23 aseptically, but to sterilize food products. From there
24 I moved to the pharmaceutical and medical device
25 industries where I worked on basically microbial control

ROBERT REICH - DIRECT

1 issues, all aspects of that from disinfectant efficacy
2 to sterilization to identification, environmental
3 monitoring, control of microbes in the environment.

4 Q What sort of projects are you involved in today?

5 A Today personally there's three or four I'm involved
6 in. One is a drug-eluting contact lens where we're
7 working on developing the process from -- basically from
8 a microbial-control standpoint and then developing
9 sterilization processes for that particular lens.

10 There's another project where we're looking at the
11 disinfectant -- commercial -- the disinfectant efficacy
12 of commercial disinfectants against environmental islets
13 in a large manufacturing plant. And we're also
14 developing a *Bacillus subtilis* biological indicator for
15 a low temperature moist heat process.

16 Q Calling your attention to Exhibit 20, which is on
17 the screen in front of you, and specifically the portion
18 here which has a Bates label in the lower right-hand
19 corner LexaMed-00123, do you recognize this document?

20 A Yes.

21 Q What is it?

22 A That's -- it's my CV.

23 Q Does it detail the sum and substance of your
24 training, education, and experience?

25 A Yes.

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1 MR. NACKOWICZ: Your Honor, I know we have --
2 the parties have stipulated that the resumes and CVs of
3 the experts may be admitted into evidence. Would you
4 like us to propose admission at this time or will you
5 wait until the end?

6 THE COURT: Either one is fine. I will admit
7 Exhibit 20, assuming that's the agreement of the
8 parties. I wouldn't typically admit CVs, but that's
9 fine. Exhibit 20 is admitted.

10 And you may proceed.

11 MR. NACKOWICZ: Your Honor, just to be clear
12 the -- this is only a portion of Exhibit --

13 THE COURT: It's clear. I've admitted.

14 MR. NACKOWICZ: I just want Your Honor to know
15 that Exhibit 20 is a voluminous document of various
16 things that --

17 THE COURT: I understand that and I would not
18 normally admit it at all because it's just hearsay, but
19 I've admitted it.

20 And you should proceed, Counsel.

21 MR. BIANCHI: I think the problem is it's the
22 whole expert report and we objected to the entire expert
23 report.

24 THE COURT: Well, then that makes it simple.
25 Exhibit 20 is out. You don't have agreement and I'm not
ROBERT REICH - DIRECT

1 admitting it.

2 MR. NACKOWICZ: Okay. I was just proposing to
3 admit the portion which is his CV, and we can provide
4 a --

5 THE COURT: It makes it simpler. I'm just not
6 admitting these. They're all hearsay. You've
7 established his credentials on the stand.

8 And you should proceed.

9 MR. NACKOWICZ: Very good. Thank you, Your
10 Honor.

11 BY MR. NACKOWICZ:

12 Q Were you hired or retained to perform services in
13 connection with this matter?

14 A Yes.

15 Q And what were you asked to do?

16 A I was asked to go through the facility in Beloit to
17 view firsthand the operation and to assess from my
18 experience if the processes there would be effective in
19 growing certain bacteria, specifically spore formers and
20 Pseudomonas for commercial product. And if I thought
21 that those -- the science behind those processes were
22 valid.

23 Q So what did you do to do that examination?

24 THE COURT: Can I get a time frame?

25 Q When did you perform these tasks?

ROBERT REICH - DIRECT

1 A In April 2012.

2 Q And what did you do in that regard?

3 A I went up to the site. We walked through the site.
4 We looked at some of their procedures. We talked to
5 some of their personnel. There was some Betco people
6 there as well that, you know -- so they were giving me a
7 tour and understanding of the processes that were being
8 used at the time.

9 Q And then in the time after you visited the plant,
10 what tasks did your employees perform?

11 A Well, based on some of my observations and some
12 hypothesis, we did some lab work to substantiate some of
13 those initial hypotheses that I drew by walking through
14 the plant.

15 Q And was that all performed at your direction?

16 A Yes.

17 Q Did you reach any conclusions or opinions in
18 connection with this matter?

19 A Yeah. There was quite a few.

20 Q Were these opinions reached to a reasonable degree
21 of scientific certainty?

22 A Yeah. Based on my -- yes, based on my experience
23 and some of the data that we generated in the lab, yes,
24 I believe that there's -- my opinions were
25 scientifically valid.

ROBERT REICH - DIRECT

1 Q Before turning exactly to your opinions, you just
2 made a lot of -- you just said a lot of technical terms,
3 so I'd like to back up and do a little groundwork for
4 bacteria.

5 So what is a bacteria or bacteria?

6 THE COURT: The Court will take judicial notice
7 what a bacteria is. You may ask your next question.

8 Q The parties have agreed that Bacillus bacteria,
9 when they are not in their vegetative state, they are in
10 spore form. Could you explain what spore form is and
11 what vegetative form is?

12 A Vegetative form is the normal form that any of the
13 Bacillus organisms, when they're growing with proper
14 nutrients and environmental conditions, will be in a
15 vegetative form. The spore forming is only a survival
16 mechanism. It's -- some species of bacteria, Bacillus
17 being one of them, can be stimulated by adverse
18 conditions to form spores, which are resistant bodies
19 that are resistant to environmental -- it's a survival
20 mechanism -- resistant to environmental stresses.

21 Q And what are Pseudomonas?

22 A Pseudomonas are not spore-forming bacteria.
23 There's two basic types of bacteria: Gram-positive and
24 gram-negative based on their cell wall chemistry.
25 Bacillus are gram-positives. Pseudomonas are

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1 gram-negative nonspore-forming organisms.

2 Q And do these Bacillus and Pseudomonas have any use
3 for mankind?

4 A Sure. I mean exactly what they're doing here.
5 They can be in bioremediation. Some of the Bacillus are
6 used to ferment other products besides these that are
7 used therapeutically.

8 Q And have you worked with spores before?

9 A Yeah. Pretty much my whole career has been spores.
10 My graduate degree was on spore formers, and currently
11 at LexaMed we have some commercial product that involves
12 spore formers and we make specialty products that
13 involve a high concentration of spore products.

14 Q How hardy are bacteria when they are in the spore
15 form?

16 A They are very resistant. Again, it's a survival
17 mechanism. To survive we use -- they'll survive
18 temperature extremes, Rh extremes, radiation extremes.

19 Q And then when bacteria are in the vegetation state,
20 how hardy are they?

21 A Well, they're significantly less resistant of those
22 types of environmental stresses.

23 Q Is there any benefit to using bacteria in the spore
24 form in a product for industry as opposed to using
25 vegetative-form bacteria?

ROBERT REICH - DIRECT

1 A Again, because of the resistance, it makes it more
2 commercially viable and they usually give them a lot
3 longer shelf life in the spore form than you will in the
4 vegetative form.

5 Q Do you grow bacteria at LexaMed?

6 A Yes.

7 Q How often?

8 A Every day.

9 Q How do you do it?

10 A Well, it depends on -- each organism is a little
11 bit different. But basically we grow them on an agar
12 medium specific for that nutrient of that particular
13 organism.

14 Q I heard the term *solid state fermentation* a little
15 bit ago. Is this process analogous to solid state
16 fermentation?

17 A It is in that the organisms are grown on a solid
18 surface.

19 Q What is fermentation? How would you define that?

20 A Classically fermentation is anaerobic respiration
21 of carbohydrates to yield carbon dioxide and alcohol and
22 energy. But no more. Traditionally it's used to -- any
23 sort of large scale microbial process, either
24 aerobically or anaerobically. So when you're using a
25 particular organism on a particular substrate to yield a

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1 product of interest, a specific product. So it's large
2 scale microbial manufacturing, if you will.

3 Q Okay. Do you create spores at LexaMed?

4 A Yes.

5 Q And what percentage of bacteria that you grow
6 actually sporulates and becomes spores?

7 A We won't harvest unless it's around 90 percent.

8 Q And is that the amount you routinely get through
9 your process?

10 A Yes.

11 Q Does LexaMed have a lab?

12 A Yes.

13 Q Is it certified or registered in any way?

14 A It's ISO certified to 13485, which is analogous to
15 the ISO 9000 quality standards and it's FDA registered.

16 Q Now, does LexaMed test the bacteria products that
17 it makes?

18 A Yes.

19 Q Does it test bacteria products for customers?

20 A Yes.

21 Q How often is testing performed at LexaMed?

22 A Daily.

23 Q Who are the people who do the testing?

24 A We have a series of technicians, all of which have
25 a science degree, either a microbiology or biology

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1 degree. We also have some chemistry, so we do some
2 chemistry too.

3 Q Do these people have any additional training?

4 A Well, they all have training, in-house training.
5 Again, part of ISO, when you look at the quality
6 systems, part of that whole regimen is training. So we
7 have a pretty comprehensive training program for anyone
8 coming in on our general quality systems approaches, as
9 well as specific testing and that they're tasked to do
10 in the laboratory.

11 Q And do you do testing for Bacillus?

12 A Yes.

13 Q And Pseudomonas?

14 A Yes.

15 Q And do you test high-bacteria-count materials?

16 A Yes.

17 Q When you're testing a material for bacteria, what
18 is the metric that's used to describe how many bacteria
19 is there?

20 A Colony-forming units.

21 Q Will a dead bacterium perform or create a colony?

22 A No.

23 Q Does that mean you're only counting live bacteria?

24 A Yes. The counts, viable counts, yes.

25 Q So why does LexaMed test its products for bacteria?

ROBERT REICH - DIRECT

1 A There's a myriad of reasons. I mean we get -- you
2 know, we're a contract lab, so we do a lot of testing of
3 bacteria. Some is if it's going to be a sterile
4 product, for example, you want to know what the baseline
5 population of a product is that you're trying to
6 sterilize so you have an idea of what sort of
7 sterilization assurance you're going to get. Other
8 products you want to find out what the bio burden is,
9 which is what the indigenous flora is in or on that
10 product at the time. We make a -- we sell, as I said, a
11 commercial product, about 12 different organisms, for
12 growth-promotion testing, so we have to know what the
13 population of those are because that's what we're
14 selling.

15 We also manufacture high-count biological
16 indicators to monitor various sterilization processes
17 and they're all *Bacillus* organisms and generally range
18 in count from 10 to the 5 to 10 to the 6 or 7.

19 Q I heard the term *certificate of analysis* used
20 earlier as well. Are you familiar with that?

21 A Yes.

22 Q What is that?

23 A Just basically what it says. It's a certificate --
24 it's testing that goes to a particular lot to certify
25 its -- that it meets its performance characteristics or

ROBERT REICH - DIRECT

1 its product specifications.

2 Q And does LexaMed issue certificates of analysis?

3 A Yes.

4 Q What do you certify when LexaMed issues such
5 certificates?

6 A Depending on the product we sell, if it's a product
7 for growth promotion, we certify count. If it's a
8 product that's going to be used to monitor a particular
9 process, a sterilization process, we certify count as
10 well as resistance.

11 Q Are these certificates, when they're issued, always
12 based upon test results?

13 A Yes.

14 Q Should they be issued without testing?

15 A No.

16 Q At LexaMed how do the employees perform these
17 bacteria testing? What method?

18 A Oh, how we're counting them?

19 Q Yes, sir.

20 A We use the plate -- a pour plate and manual count
21 for the most part. We do some surface counting as well.

22 Q So how does that work generally, the process from
23 start to finish?

24 A If it is a high -- a high-count product,
25 anticipated high count, there will be some dilutions

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1 made and you plate those dilutions. A certain aliquot
2 will be put into a plate. It will be added to agar or
3 put on the surface of the agar. If it's -- if the agar
4 is poured on the plates, they're allowed to set up, then
5 they're incubated. After a certain period of incubation
6 appropriate for that particular organism, the time and
7 temperature appropriate for the particular organism
8 we're dealing with, then the actual colonies are
9 counted, manually counted.

10 Q So a person actually counts how many colonies are
11 there.

12 A Correct.

13 Q And why is it you use that method?

14 A For our purposes it's most convenient. A lot of
15 the automatic methods, they maybe are higher volume
16 product or we found that we validated those methods so
17 we know that they're appropriate for our particular use.
18 So that's the method that we use. And it lends itself
19 to the wide variety of bacteria that we're dealing with
20 on a daily basis. And not just bacteria, but we do some
21 fungi work as well.

22 Q So there are other ways to count, but you just use
23 the hand-counting method.

24 A Correct.

25 Q Is measuring turbidity a way to count bacteria?

ROBERT REICH - DIRECT

1 A Yes. You can correlate optical density to count,
2 yes.

3 Q And can you explain turbidity? How you would count
4 by turbidity?

5 A Well, it's -- you correlate the turbidity or the
6 optical density of a particular solution to a count. So
7 you get a curve that goes count versus turbidity. So
8 then rather than having to count the plate and wait for
9 incubation, you can just look at the turbidity using a
10 spectrophotometer and you can correlate that particular
11 optical density to a particular bacterial count.

12 Q Now, does that process count both live and dead
13 bacteria?

14 A Yes. The turbidity doesn't differentiate
15 viability.

16 Q And I think you mentioned earlier that there are
17 machines that can be used to count as well; is that
18 correct?

19 A Yes.

20 Q Are there any drawbacks to using a machine?

21 A Well, there's some. It depends on which -- you
22 know, there's a number of different machines. We heard
23 about spiral counting. There's also all kinds of
24 automatic readers. The automatic readers -- in our
25 experience we've had difficulty validating some of the

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1 automatic readers. It doesn't count some of the
2 bacteria that are by the edge of the plate.

3 Depending on how the optics work and what organisms
4 you're using, you have to reset the optics of those,
5 especially if you're dealing in, like, mixed cultures.
6 A lot of bacteria have -- they're different. Some are
7 pigmented, some are not. Some are more translucent than
8 others. Some are spreaders. So the optics doesn't
9 always work. One setting doesn't always fit all
10 occasions.

11 So we -- you have to change that. So from our
12 standpoint, the manual method works best for the
13 procedures that we do in our laboratory.

14 Q And you mentioned validation. What is that?

15 A That's making sure that you do the same thing all
16 over and over again and get the same result. You
17 validate that particular process by doing a series of
18 tests to make sure that that process is correct, it
19 yields the right outcome that you're looking for and is
20 repeatable.

21 Q Have you ever heard of the theoretical count method
22 of counting?

23 A I don't know what that is.

24 Q How comparable are plate count testing results from
25 one lab to another?

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1 A Well, there's certainly, there's a lot of
2 variability in all the steps that we mentioned. If it's
3 a flusion process, there's variability there. There's
4 variability in plating. I think the counting is pretty
5 much the same. It's probably a good plus or minus 50
6 percent.

7 We did a round-robin study not too long ago through
8 an organization called the *Association of Advancement of*
9 *Medical Instrumentation* or AAMI. They write standards
10 both for domestic as well as internationally, and we did
11 a round-robin study and that 50 percent was about right
12 using biological indicators, which are high-count spore
13 products.

14 Q Turning specifically to what you did --

15 THE COURT: I'm sorry, I just didn't follow
16 that part. The variability is between any two labs even
17 if they're doing hand counts? Or the variability is
18 experienced between labs using these automatic methods?

19 THE WITNESS: No, any method.

20 THE COURT: This is --

21 THE WITNESS: We were using any system because
22 of the inherent variability of multiple steps, when it's
23 additive from, you know, the differences in agar,
24 different incubation time, difference in dilutions, all
25 those things. It gets about a --

ROBERT REICH - DIRECT

1 THE COURT: I get it. I get it.

2 THE WITNESS: I'm sorry.

3 THE COURT: So my question is is there a
4 variability in systems? So in other words, did you
5 ever -- have you tested between labs' variability
6 between hand counting versus between automatic system
7 counting?

8 THE WITNESS: I don't believe there's any
9 automatic system counting in that round-robin study. We
10 have done some work when we have validated manual
11 methods and we found them to be fairly well competent
12 when they're well controlled using the same organisms.

13 THE COURT: So what I'm hearing you say is if
14 you develop a good automatic method, it can be just
15 about as accurate or inaccurate as hand counting between
16 labs.

17 THE WITNESS: Yeah. And as we said, there's
18 multiple automatic methods. All the methods have their
19 own weaknesses and -- strengths and weaknesses. But
20 yes, we've had comparable success in comparing counts
21 from manual and certain automatic methods.

22 THE COURT: Thank you very much. You may
23 proceed, Counsel.

24 MR. NACKOWICZ: Thank you, Your Honor.

25 BY MR. NACKOWICZ:
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1 Q You said you examined the plant in Beloit. What
2 sort of processes did you see there?

3 A Well, we walked through the plant and we looked
4 at -- there was a process for growing spores and just
5 getting a spore yield. There was the wet process in
6 which they grew up different levels of bacteria, both
7 Pseudomonas and Bacilli. Then inoculated those onto a
8 solid matrix and then went through certain processes to
9 get those to sporulate to yield the final product. So
10 as we looked at the wet spore-making process and the --
11 or the spore-growing process and the wet process of
12 making their solid state product.

13 Q And then you said that after your visit, you had
14 LexaMed employees perform testing. Why did you do the
15 testing?

16 A Because all we did is walk through. We looked at
17 some data. We talked to the people in the lab and some
18 of their procedures, but we came to certain conclusions
19 and based on those conclusions -- I won't say
20 conclusions. We had basically hypotheses and we wanted
21 to prove or disprove those hypotheses through generation
22 of data in our laboratory.

23 Q Was this all done at your direction?

24 A Yes.

25 Q And this testing for plate count, was it done
ROBERT REICH - DIRECT

1 pursuant to the methods that we had talked about a
2 little bit ago?

3 A I'm sorry, repeat. What testing? Our testing was
4 done using the manual plate counting method, if that's
5 what the question is.

6 Q Correct. Thank you. Do you have written
7 procedures that were followed during this testing
8 process?

9 A Yes. We have specific procedures for performing
10 plate counts and we had specific work instructions for
11 doing the work that we did in association with the Betco
12 project.

13 Q And were written test results created?

14 A Yes.

15 Q And are those the results that are attached to your
16 reports?

17 A Yes.

18 Q How reliable is the testing that you performed in
19 this case?

20 A How reliable?

21 THE COURT: Plus or minus 50 percent. Why
22 don't you continue, Counsel.

23 MR. NACKOWICZ: Yes, sir.

24 BY MR. NACKOWICZ:

25 Q Is manual plate counting supported by peer
ROBERT REICH - DIRECT

1 literature and scientific literature in the industry --

2 A Yes.

3 Q You had said plus or minus 50 percent is an
4 acceptable tolerance. Would factors of 10 be within the
5 acceptable tolerance?

6 A No. You're talking log differences?

7 Q Is a log a factor of 10?

8 THE COURT: I'll take judicial notice of that
9 too, Counsel. Could you please proceed.

10 MR. NACKOWICZ: Sure.

11 BY MR. NACKOWICZ:

12 Q I want to turn directly to your reports now, and
13 they won't be admitted for evidence as the Judge said a
14 little bit ago, but I wanted to use them to refresh your
15 recollection and help the Judge understand what you did
16 and the conclusions you drew. So turning your
17 attention --

18 MR. BIANCHI: Real quick, I don't have a copy
19 of them.

20 MR. NACKOWICZ: This is Exhibit 20. Sorry.

21 MR. BIANCHI: Our Exhibit 20 is four pages
22 long.

23 MS. GEHRIG: Well, there's a disk.

24 MR. BIANCHI: Sorry. I don't have a disk
25 drive.

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1 THE COURT: All right. We're going to proceed.
2 Ask your questions of this witness and you can make
3 arrangements at the break. Please proceed.

4 MR. NACKOWICZ: Thank you, Your Honor.

5 BY MR. NACKOWICZ:

6 Q Turning to the page labeled Bates 0001, do you
7 recognize this document?

8 A Yes.

9 Q And who is the author?

10 A I am.

11 Q Calling your attention to page LexaMed-00011, I see
12 there are four bullet points at the top of this page.
13 My understanding is these are your conclusions. I'd
14 like to quickly review them.

15 Can you sum up the sum and substance of the first
16 bullet point?

17 A The first bullet point talks about the wet process
18 where we -- they grow up a particular number of
19 vegetative cells they added on to the solid matrix.
20 There is, based on my understanding, there's some growth
21 involved with that, and then those organisms will turn
22 to spore form to give you your count.

23 My evaluation of that, it would be very difficult
24 for that process to work, to get synchronous sporulation
25 like that. The conditions were not controlled enough.

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1 We were getting some high-count product. There was
2 anticipated some growth. They put some nutrient on
3 there. But the substrate themselves had a high level of
4 bacteria associated with them and they'd have varying
5 degrees of nutrients because it wasn't a controlled
6 substrate. So that I found it very difficult to see how
7 you would get synchronous sporulation from those
8 organisms based on either a depletion of the nutrient or
9 on the differential drawing that they were doing.

10 THE COURT: When you say controlled substrate,
11 are you talking about the medium?

12 THE WITNESS: Yes, the medium. The solid that
13 they put it on.

14 THE COURT: It's just you used two different
15 terms. I wanted to make sure.

16 THE WITNESS: Oh, I'm sorry.

17 THE COURT: Essentially you meant the same.

18 THE WITNESS: I did. I did.

19 THE COURT: You may proceed, Counsel.

20 MR. NACKOWICZ: Thank you.

21 BY MR. NACKOWICZ:

22 Q So do you believe that the wet-batch process is
23 based on sound scientific principles?

24 A In this case, no, I do not believe that we would
25 get a conversion of spores, a high-spore population.

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1 Q What about the Pseudomonas bacteria?

2 A The Pseudomonas, as we mentioned before, are not
3 spore formers. So when you start to go through that
4 drying process, I think you would lose viability and
5 you'd have a hard time maintaining your Pseudomonas
6 counts.

7 Q So do you think this process is viable on a
8 commercial scale?

9 A Not that -- I don't believe it's viable to meet the
10 specifications that we were given at the 5 times 10 to
11 the 9 and to maintain that -- to achieve that routinely
12 and to maintain that over any sort of shelf life.

13 Q Is 5 times 10 to the 9, does that mean 5 billion?

14 A Yes.

15 Q The second bullet point talks about the equipment
16 that you examined. Do you have an opinion as to the
17 equipment?

18 A Yeah. There was one fermentor there that was
19 equipped with feedback loops and you can fix it so you
20 can control the temperature and pH. There were other
21 tanks that were really holding tanks that were being
22 used as fermentalists that didn't have that same
23 feedback loop or control features.

24 Q And then the next bullet point, the third one, it
25 references contamination. Did you have opinions as to

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1 contamination at your initial --

2 A Yeah, there was a lot of opportunity for
3 contamination, both of the product. The substrate was
4 -- brought in a lot of bacteria with it. That would not
5 be what the product was specified to have. So I think
6 there was a lot of opportunity for contamination, and
7 we'll go through some of the studies where we supported
8 that hypothesis.

9 Q And then your final bullet in this section here,
10 you discuss the ability to optimize the process. What's
11 your opinion regarding that?

12 A Well again, I thought -- since I didn't believe --
13 I didn't feel the process was scientifically valid, I'm
14 not sure how you could use that existing facility to
15 increase the yields very well if we weren't making good
16 product to start with.

17 Q Turning your attention to the next document, this
18 is LexaMed-00013. Do you recognize this document?

19 A Yes.

20 Q And who authored this?

21 A I authored this -- I authored this document.

22 Q Turning to the next page, LexaMed-00014, at the
23 bottom of the page underneath that table there's a
24 paragraph that starts out *Comments*. Could you explain
25 your opinions that are in that paragraph?

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1 A We were looking at -- we got product from --
2 samples of product were supplied by the site, by Betco,
3 of different products and we were confirming the count
4 and we were looking at the count during production. We
5 found counts that were approximately 1-log lower than
6 what the specification was.

7 Q Anything else?

8 A They were off by 90 degrees -- I mean 90 percent.
9 I'm sorry.

10 Q And so does this data support your initial
11 conclusions that --

12 A It's supporting our initial conclusions that we
13 thought would be a hard time of getting and maintaining
14 those initial spore counts.

15 Q And then if you'd refer to the next page,
16 LexaMed-00015, again right below the table you have a
17 paragraph that starts out *Comments*. If you could
18 elaborate on your comments there.

19 A Again, we were looking at the total microbial count
20 of different batches that they had given us. Let me
21 look at this. This is what -- this was on looking at
22 stability and we were looking at two different lots that
23 were at two years old and comparing them to the original
24 counts that were given by the site at 24 and 48 hours
25 and we found that they were off -- at the two-year mark

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1 they were off at least 3 logs.

2 Q So at the end of two years --

3 A Sometimes 4 logs at the end of --

4 Q So at the end of two years, 99 percent of the
5 bacteria was no longer there?

6 A Not if it's 4 logs, it would be 99.99 percent.

7 Q Does that support or refute your --

8 A Again, it supports some of our initial hypotheses.

9 Q And then turning to the next page, LexaMed-00016.
10 Again, there's a table below it. There's a paragraph
11 that starts out *Comments*. Could you elaborate on your
12 opinions found there.

13 A Yeah. We were looking at the substrate material,
14 and that's what we had talked about before. We were
15 looking at what the count was on that substrate
16 material, looking at the corn and the rice and the kelp
17 product. And the total counts were pretty high into the
18 3- to 4-logs and most of those were spores. We did a
19 total spore count.

20 You can differentiate the spores from the
21 vegetative cells by doing a process called *heat*
22 *shocking*. So we said the vegetative cells and the
23 gram-negatives are not heat resistant. So if you heat
24 shock that product, you kill off those, leaving the
25 spores. So it's a method of differentiating the spore

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1 formers in the total microbial population.

2 So as you can see the heat shock here, we were
3 getting either up to the 10 to the 3 or 10 to the 4 per
4 gram spore formers in the substrate that was being used
5 for the product.

6 Q So what you're saying is when the substrate came
7 in, it already had a lot of bacterial already in it.

8 A Yeah. We did that. There was some discussion when
9 we were in there that some of that product may have been
10 eradicated to knock down those counts, but we couldn't
11 find or no one could find any sort of certificate of
12 processing. So we just -- we were looking at seeing
13 what was -- what the microbial population was associated
14 with those substrates.

15 Q So this goes to the contamination issue?

16 A Yes.

17 Q And why does contamination matter here?

18 A Well, it can have, all these other bugs, they can
19 overwhelm the indicator organism that you're looking
20 for. You can get -- it can overwhelm that process. I
21 don't know what the contamination, what this particular
22 contamination will do for the functioning of this
23 product. I'm not aware of that.

24 THE COURT: What was the substrate that you
25 tested?

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1 THE WITNESS: We tested -- there's a corn and a
2 rice and a kelp that they used to put the ferment they
3 make and they put it on that. We tested those, the raw
4 substrate before it was inoculated with the fermentate.

5 THE COURT: But you took that substrate and
6 medium back to your lab, as you understood it was used
7 regularly by Bio-Systems, and then you tested it for
8 contaminants which produced even spores --

9 THE WITNESS: Yes, we tested -- correct. We
10 didn't -- when we took it, we didn't actually sample the
11 product. The product was sampled by representatives of
12 the site and they sent the samples to us. We didn't
13 have individuals on site actually doing the sampling.

14 THE COURT: All right. So someone from
15 Bio-Systems --

16 THE WITNESS: Yeah, we requested what we wanted
17 and they sent us labeled portions of the particular
18 substrates and we tested that.

19 THE COURT: Thank you.

20 BY MR. NACKOWICZ:

21 Q And you said the -- you mentioned indicator
22 organisms. You're referring to the bacteria the plant
23 is intending to grow?

24 A Yeah. What the product is labeled. You know, if
25 it's, whatever it is, megaterium or subtilis or whatever

ROBERT REICH - DIRECT

1 Bacillus they're using.

2 Q Is there a contamination in the products that
3 LexaMed produces?

4 A No.

5 Q Turning your attention to the next report.
6 LexaMed --

7 A I like that font a lot better though.

8 Q LexaMed-00035. Do you recognize this document?

9 A Yes.

10 Q And who is the author of this?

11 A You'll have to go down it. It's one of our -- one
12 of my associates, Mike Sugg.

13 Q Was the report created at your direction?

14 A Yes. I was aware of what the studies were that
15 were being done, but it was under his -- he was
16 physically at the lab overseeing the project.

17 Q And turning to LexaMed-00037, there is a paragraph
18 at the top of the page under *Comments*. Could you review
19 that and explain your opinion there?

20 A Could you go back to the previous page, please?

21 There was a table -- yeah, there you go. I'm just
22 trying to remember what this particular one was. We
23 were looking at the particular -- we got some samples of
24 the product from all the different organisms, two
25 Pseudomonas, Fluorescens and Putida, and the four or

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1 five different bacteria spore former. So we were
2 looking to see what the microbial count per gram was
3 there.

4 So we got a total count on the product and then we
5 were seeing what portion of that particular count was
6 actually spore formers.

7 Q And what percentage of the count was what --

8 A It was very low. This says less than 1 percent,
9 but if you look, it's -- if it was labeled 2.1 times 10
10 to the 9, it went to 10 to the 4, so that's .001 percent
11 or .01 percent.

12 Q So the takeaway is 1 percent or less of the
13 bacteria was the target organism?

14 A Correct.

15 Q So in other words, it was almost entirely in
16 contaminant?

17 A It was -- right. There was organisms other than
18 what -- the target organism or the indicator organism.

19 Q Turning your attention to the next report,
20 LexaMed-00046. And is this document familiar?

21 A Yes.

22 Q And who authored this one?

23 A It was again authored by Mike Sugg.

24 Q And again at your direction?

25 A Yes. He's a laboratory supervisor with us.
ROBERT REICH - DIRECT

1 Q Turning your attention to the next -- to page
2 LexaMed-49 under the *Comments* section. If you could
3 elaborate as to your conclusions here.

4 A This was a -- this study followed the last one.
5 The last study said here is the product. We don't find
6 the indicator organism -- you know, we don't find the
7 majority of the organisms associated with that product
8 to be what -- the indicator organism. So then we went
9 to the next study, looked at the same products, and we
10 tried to identify what organisms were associated with
11 that product. So we got sent -- and if you go to the
12 beginning, I believe the site sent us particular plates
13 that they had sent us from this particular product. We
14 identified what organisms were associated with those
15 plates. And if you look here, the results indicate that
16 we had a lot of gram-positive cocci. We had a lot of
17 organisms; in fact, we had a lot of organisms that were
18 not the indicator organisms associated with the product.

19 THE COURT: Were these in spore or
20 vegetative --

21 THE WITNESS: Some of them were supposed to be
22 spores. We found the majority to be vegetative
23 organisms.

24 THE COURT: Which means under stress most of
25 those will go away.

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1 THE WITNESS: Under stress -- that's correct.
2 And if you look at when we did that heat shock and
3 nonheat shock count, you can see the heat shock count
4 was 10 to the 9. The nonheat shock count -- I'm sorry,
5 the other way around. The total count was 10 to the 9.
6 The heat shock count was like 10 to the 5. So that's
7 .00 -- you know, 99.99 percent the organisms were not
8 spore formers.

9 THE COURT: Does the indicator organism
10 increase in the percentage once you put it through
11 stress because they're in spore form? Or did you test
12 for that?

13 THE WITNESS: Well, we tested just spore forms.
14 I didn't test -- we didn't do that exact study that
15 you're running. But if you look at some of this data
16 here, we weren't even finding too many spore formers in
17 some of these products. So on these plates here it was
18 a little different, but I didn't do that study that you
19 just --

20 THE COURT: All right. Next question, Counsel.

21 BY MR. NACKOWICZ:

22 Q So again, the takeaway is that of the materials
23 that were sampled in this study, it was mostly
24 contaminants and not the target organism?

25 A Correct.

ROBERT REICH - DIRECT

1 MR. BIANCHI: Objection. Leading.

2 THE COURT: Well, it's a little late for that.

3 In any event, he answered.

4 BY MR. NACKOWICZ:

5 Q Does this set of testing and then the previous one
6 we just discussed, does that support or refute your
7 initial hypothesis as to the viability of the wet-batch
8 process?

9 A It supports not just the viability, it's the whole
10 combination of that and the contamination.

11 Q Turning your attention to the next report, LexaMed
12 000-61. Again, ask you to look at it and tell me if you
13 recognize it.

14 A Yes.

15 Q And who's the author here?

16 A Jim Whitcomb.

17 Q And he was a LexaMed employee?

18 A Yes.

19 Q And was this test also done at your direction?

20 A Yes. I was aware of all the testing that was being
21 done.

22 Q I will turn to your *Conclusions* section here, which
23 is LexaMed-00070. There's three conclusions under your
24 *Conclusions* section. If you can just quickly unpack
25 those.

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1 A What we did here is we tried to simulate the
2 process that was being done, the wet process. We tried
3 to simulate that. We got -- all the materials were
4 obtained from the site. They sent us the organism.
5 They sent us the substrates. And we tried to duplicate
6 exactly that to see if we could replicate that process
7 and see how it worked in our hands. And when we tried
8 the wet process with Pseudomonas, we were not able to
9 maintain the population of Pseudomonas going through the
10 process. We had a loss on -- we couldn't get the
11 organisms to survive and grow in that operation, and
12 going through the drying process we lost viability.

13 Q How tolerant are Pseudomonas to dessication?

14 A Tolerant?

15 Q Yeah.

16 A They're not very tolerant. We have -- well, I'll
17 just stop. We use Pseudomonas daily.

18 Q And the second conclusion, 3.2, that's regarding
19 the viability of the Bacillus production?

20 A Yeah. It showed that we did get stable spores, but
21 they continued -- they -- it wasn't a synchronous
22 process. We continued to have increased spore counts;
23 stabilize after approximately one week; reached
24 approximately 20 percent or less; populations from the
25 simulated process did not reach the specification of 5.7

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1 times 10 to the 9 per gram.

2 Q So you were unable to hit the targets.

3 A Correct.

4 Q And then the third conclusion. 3.3 regards
5 contamination?

6 A Again, there was a lot of contamination. As I
7 said, it comes in with that substrate and it was
8 obscuring a lot of our counts. It was hard to -- a lot
9 of *Bacillus* are very similar morphologically so it's
10 hard to differentiate them.

11 Q So do these studies support or refute your initial
12 hypothesis about the viability of the wet-batch process?

13 A It supports it.

14 Q And then the final report here, LexaMed-85. Again,
15 if you could look at the page here and tell me if you
16 recognize it.

17 A Yes.

18 Q And it is also authored by Jim Whitcomb?

19 A Yes.

20 Q And again at your direction?

21 A Yes.

22 Q Turning to the *Conclusion* section in this one,
23 LexaMed-00089. Here too you have three conclusions, if
24 you could just briefly elaborate.

25 A Yeah. Can we go back to the tables in there? What
ROBERT REICH - DIRECT

1 we were trying to do here, we got -- they are stock
2 cultures of organisms. They kept samples, frozen
3 samples of the fermentate, and they also had life-like
4 samples from a recognized culture collection. So what
5 we wanted to do --

6 THE COURT: When you say *they*, you mean
7 Bio-Systems?

8 THE WITNESS: I'm sorry. Yeah, the site.
9 Bio-Systems.

10 THE COURT: Thank you. Next question -- I'm
11 sorry, you were going to explain that --

12 THE WITNESS: Yeah, I was just going to say
13 what we were doing here, we were looking at -- could you
14 go back up a little bit? I'm sorry. I just don't
15 remember the exact -- so we have the stock cultures that
16 we got from them. We tried to identify those. We have,
17 in-house, we have an automatic microbial identification
18 system known as the Biolog System. It works on
19 basically -- it's based on bacteria growth. And we were
20 able to identify -- they listed their -- they sent us
21 samples of their organisms, and as you can see, we were
22 able to confirm the stock culture for fluorescens,
23 putida, and subtilis. We had some differences in
24 results with the Bacillus on a couple of the species.
25 They all came out to be Bacilli, but we had some

ROBERT REICH - DIRECT

1 differences in species.

2 BY MR. NACKOWICZ:

3 Q So you're saying some of the starter cultures are
4 contaminated?

5 A Yes. And then to confirm that, we sent it out for
6 DNA sequencing to another contract laboratory to make
7 sure that there wasn't an artifact from our method. And
8 they were also -- the DNA sequencing showed one of the
9 organisms was not what it was purported to be.

10 Q And then the third conclusion, 3.3, it says
11 "Bacillus licheniformis and Bacillus megaterium
12 fermentate lots are both contaminated." What's a
13 fermentate lot?

14 A That's when they were -- they took us, when they
15 first grow it up from their stock culture, they make --
16 they enhance the number of organisms. And when we were
17 looking at those they were labeled as Bacillus
18 licheniformis and Bacillus megaterium, the organisms in
19 that lot were actually identified as Bacillus cereus,
20 both by our method as well as by the genetic sequencing.

21 Q So you found contamination here too.

22 A Correct.

23 Q And does this study support or refute your initial
24 hypothesis?

25 A I don't know if that -- it's contamination in that
ROBERT REICH - DIRECT

1 it wasn't the organism. They were starting with -- the
2 organism they were starting with was the wrong organism.
3 From that standpoint, it was a contaminant based on the
4 labeling that was given to that product.

5 Q And do these studies support or refute your initial
6 hypotheses about the viability of the wet-batch process?

7 A They support that as well as the contamination
8 issue.

9 MR. NACKOWICZ: Thank you. (9:44 a.m.)

10 THE COURT: Cross-examination.

11 CROSS-EXAMINATION

12 BY MR. BIANCHI:

13 Q Mr. Reich?

14 A Yes.

15 Q Do you know what the value of your lab is? Do you
16 have like a monetary value?

17 A Of our lab?

18 Q Yeah.

19 A Five million. Four to five million.

20 Four-and-a-half.

21 Q But that's just the lab portion of it?

22 A No, that would be the whole company. That would
23 include the consulting component as well.

24 Q And when you wrote these opinions or I should say
25 when you had directed someone to do that, how long

ROBERT REICH - CROSS

1 between when you examined the plant and then tested the
2 products to when you reached your opinions?

3 A If you look at the dates, I think that we -- I
4 examined the plant in April, and a lot of the testing
5 started in May, June, and July. So pretty quickly
6 thereafter.

7 Q So a couple months.

8 A Yes.

9 Q And I know you mentioned being ISO certified;
10 correct?

11 A Yes.

12 Q And this ISO certification is specific to the
13 medical device industry; is that right?

14 A No, not really. It's 13485 is a subsection of ISO
15 9001, which I think is what you guys -- I'm sorry, what
16 the plant is certified to as well; shows an overall
17 quality system, which all processing, in terms of
18 manufacturing, in terms of personnel training and
19 procedures, all that stuff. But you're right, 13485 is
20 a subset that focuses on the medical device industry.

21 Q And being ISO certified demonstrates that your
22 company has a level of control and systems around its
23 processes; is that right?

24 A Correct.

25 Q And just to be clear, for the past 40 years you've
ROBERT REICH - CROSS

1 been working in the medical and pharmaceutical
2 industries; correct?

3 A That is correct.

4 Q And the medical device and pharmaceutical
5 industries are regulated by the FDA; is that right?

6 A That is correct.

7 Q And you are not an expert on marketing and
8 advertising, are you?

9 A Although I do it at my company, I would not
10 consider myself an expert.

11 Q And before serving as an expert for Betco in this
12 case, you had never worked specifically for a wastewater
13 treatment or septic system company; is that correct?

14 A That is correct.

15 Q As far as you're aware, Bio-Systems produces
16 products for an industry that is not regulated by the
17 FDA; that is, it's not an FDA-regulated concern; is that
18 correct?

19 A That's my understanding, yes.

20 Q And indeed there are no government agencies that
21 you're aware of that regulate Bio-Systems or its
22 industry.

23 A Yeah, I don't know that. So yes, that would be
24 true.

25 Q And in all the tests that you did, LexaMed never
ROBERT REICH - CROSS

1 tested any of Bio-Systems' products to determine if they
2 actually worked as presented; is that right?

3 A No. We tested based on what the label copy or the
4 specs were. We did not test them -- in a sewage
5 treatment application you mean? No, we did not do that.

6 Q And so you wouldn't know if the product actually
7 worked if it was dropped into a sewage treatment
8 facility.

9 A I couldn't swear to that. I know that we know that
10 some of the bugs weren't what they purported to do and
11 some of those bugs are chosen because they have
12 particular enzyme systems or whatever to chew up, you
13 know, whether it's a lipase or amylase or whatever
14 you're looking for. But no, I can't swear that they
15 would not work.

16 Q And you kind of referenced that a lot of the tests
17 found less than 1 percent of -- I think the words you
18 used was the indicative?

19 A Indicator organism or whatever.

20 Q Sorry. Indicator organism.

21 A Yeah, whatever the product was labeled to have.

22 Q Sure. So would that make you believe that likely
23 the product wouldn't work?

24 A I would guess that it may not work as well as you
25 would expect. If you were purporting to have 10 to the

ROBERT REICH - CROSS

1 9 and we had -- and we couldn't identify it, if there
2 was just a lower number of organisms, I would think it
3 wouldn't work as effectively.

4 Q And again, I know you examined the plant in April
5 of 2012, and you also -- the products that you were
6 testing were ones that were created around that same
7 time, April 2012; is that right?

8 A Yeah. A lot of the in-process -- when they took
9 samples of their in-process stuff, we did test some that
10 had some age on it where we looked at what the count was
11 after two years. But the majority of the product we
12 tested was formed around that time, yes, after April of
13 2012.

14 Q And you yourself or even the people that were
15 working for you never saw any actual labels that were
16 used with the products that were being tested; is that
17 correct?

18 A I've seen some labeled -- well, since then I've
19 seen labels that talk about counts of, you know, some of
20 them say 200 billion, some say 5 billion. But yeah, in
21 that range. But at the time we were told that the
22 specification was 5.7 times 10 to the 9.

23 Q And when you did the actual test that resulted in
24 your report, you never saw any of the labels that were
25 used with the products.

ROBERT REICH - CROSS

1 A At that time when I did the test, I had not seen
2 the labels. I was told the specification.

3 Q Okay. Thank you. And if there was nothing on a
4 label that said there was a specific amount of a
5 specific bacteria in a product, then any bacteria in the
6 product would satisfy that label claim; isn't that
7 right?

8 A I'm sorry, say that again.

9 Q Sure.

10 A I'll repeat. If the label did not specify the
11 microbial count and not a specific organism --

12 Q Correct. If it just said --

13 A -- then the total count would be what you would be
14 looking at, yes.

15 Q And you don't know, based on any of your tests,
16 whether additional bacteria in a product that's used in
17 a septic or wastewater treatment plant would help the
18 performance of the product; is that right?

19 A I do not know if it would help it or hinder it. A
20 lot of times you could see that one of the --

21 THE COURT: You've answered the question.

22 THE WITNESS: Okay.

23 THE COURT: Next question.

24 BY MR. BIANCHI:

25 Q And in testing the products and the procedures at
ROBERT REICH - CROSS

1 the Beloit plant, your main contact at Bio-Systems was
2 Neil Seeger; is that right?

3 A Correct.

4 Q And as your main contact, it was Neil who provided
5 you the procedures that he suggested Bio-Systems was
6 using; is that right?

7 A Yes.

8 Q So if Neil provided the wrong procedure, say he
9 misstated the temperature or a moisture level, then that
10 means you would have relied on that incorrect
11 information in reaching your opinions; isn't that right?

12 A That's correct. We tried to simulate the
13 procedures as we were given them.

14 Q And you believe that the procedures that you were
15 provided contained very important details; isn't that
16 right?

17 A Yes, yes.

18 Q To the point where getting one or two of those
19 details such as temperature, for example, wrong could
20 greatly affect the result of your tests; is that right?

21 A If we used a different incubation temperature, yes,
22 it could affect the results.

23 Q And just to be clear, when you -- when I say you, I
24 mean LexaMed. When LexaMed did its test of procedures
25 and products, it never spoke with my client Malcolm

ROBERT REICH - CROSS

1 Peacock; is that right?

2 A No, never spoke with Malcolm. Never met the
3 gentleman.

4 Q And you said in April you did a quick walk-through
5 of the plant; is that right?

6 A That's correct.

7 Q And when you did that walk-through, the issues you
8 raised in your report about lack of temperature control
9 or lack of cleanliness, no moisture control, those were
10 all obvious issues to you; is that right?

11 A Yes.

12 Q You simply walked through the plant. You could see
13 that.

14 A Doors were open to the outside. There was no
15 control, so yes.

16 Q The cleanliness of the Beloit plant, including
17 having some product that might be spilling into others,
18 was a result of employees at that plant and not any of
19 the processes that you were testing; isn't that right?

20 A I would guess it was a procedural issue with the
21 plant. I mean certainly the processes didn't define
22 contamination or cross contamination of issues, yes.

23 Q And I've mentioned temperature a couple times, but
24 to be clear, the temperature at which one grows bacteria
25 affects its growth; isn't that right?

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1 A It can affect the growth rate for sure. I mean
2 there's optimum temperatures for each of those bacteria.
3 If it's slightly different, they'll just grow a little
4 slower. But yes, the incubation temperature is a
5 significant factor.

6 Q And if the temperature is too high or too low, then
7 the bacteria may not grow at all; correct?

8 A Yes. If it's outside their growth range.

9 Q And also moisture levels are critical in growing
10 bacteria; isn't that right?

11 A Yes.

12 Q And in fact, bacteria need a certain moisture level
13 to be able to grow and to reproduce.

14 A Correct.

15 Q And I know your report often mentions the wet-batch
16 process, but another name for that is *solid state*
17 *fermentation*; correct?

18 A Correct.

19 Q And you understood that the goal of this wet-batch
20 process or solid state fermentation at Bio-Systems was
21 to form bacteria spores; correct?

22 A Yes. The eventual end-product, yes, was bacteria
23 spores.

24 Q And --

25 A Well, unless it was *Pseudomona*. But for the
ROBERT REICH - CROSS

1 Bacillus, yes.

2 Q And you had noted that to get them to turn into a
3 spore, you stressed the bacteria, the Bacillus; right?

4 A Correct. That's one method whether -- yeah, it
5 could be temperature stressing or nutrient stressing.

6 Q And you just named temperature and nutrients.
7 Those are sometimes referred to as triggers to trigger
8 sporulation; correct?

9 A Yes, you could say that.

10 Q And you could potentially remove certain nutrients
11 and that could cause sporulation; right?

12 A Yes.

13 Q Did you test to see if the removal of ammonia would
14 cause the bacteria to sporulate using Bio-Systems' solid
15 state fermentation process?

16 A We used the same media, and I forget the
17 designations. Whether it be you had a sporulation media
18 that was -- wasn't as nutritious as the other media that
19 you grew up to get vegetative cells when you were
20 forming -- when you were growing your fermentate to
21 inoculate the substrate. So there was two different
22 media. We looked at both of those media and we were
23 able to get sporulation in the sporulation media, and we
24 had primary vegetative cells in your enriched media.

25 And I'm sorry, I don't remember the designations.

ROBERT REICH - CROSS

1 Q But you didn't specifically check if the removal of
2 ammonia would cause the bacteria to sporulate; is that
3 right?

4 A Not taking it out of the media. We use the media
5 that was formulated with lower concentrations of
6 ammonia.

7 Q And just to make sure that we're clear here, using
8 the wet-batch process can generate and grow bacteria
9 spores; correct?

10 A Yes.

11 Q And in fact, your problem, what you noted as a
12 problem with the wet-batch process was the way in which
13 it was being applied at Bio-Systems; isn't that correct?

14 A I guess that's a fair statement.

15 Q So your opinion is that the wet-batch process as it
16 was told to you can grow spores, but just not at
17 consistent high levels; isn't that right?

18 A Yes. It will grow some spores, but not at
19 consistent levels to meet the -- yes.

20 Q And consistent to you means getting the same final
21 outcome of spores over and over again; correct?

22 A Yes.

23 Q So to break down your opinion further then, it's
24 that the wet-batch process, the yields or the results
25 were not consistent; correct?

ROBERT REICH - CROSS

1 A Yes. They were variable.

2 Q And that variable means that at times you could get
3 really high counts and then at other times you could get
4 really low counts; correct?

5 A Yes.

6 Q And it could be possible during the times when you
7 were getting high count to produce more product at that
8 time and store it; isn't that right?

9 A I don't know. It would be variable if it were
10 between batches. It's going to depend on the substrate.
11 It's going to depend on the fermentate, on the
12 conditions. So I don't know, if you'd had a good batch
13 on Monday, I don't know if it necessarily assumes
14 there's a good batch on Tuesday or Wednesday. But
15 that's a definition of variable, I guess.

16 Q And if somebody wanted to grow bacteria using the
17 wet-batch process as you were informed about it, they
18 could use that process in a bucket at their house and
19 grow bacteria; isn't that right?

20 A Could you grow bacteria in a bucket at your house?

21 Yes. Given the -- you know, if you had the proper --

22 THE COURT: The Court will also take judicial
23 notice of that. You may proceed.

24 BY MR. BIANCHI:

25 Q And so with this -- the different -- we talked
ROBERT REICH - CROSS

1 about temperature and moisture and substrate. Even
2 minor adjustments in those areas would have an effect on
3 the overall wet-batch process used in producing
4 bacteria; isn't that right?

5 A Adjustments in temperature, moisture, and nutrients
6 could affect the outcome? Yes.

7 Q Or any one of those. Not even all together.

8 A That's correct. Any one individual could change
9 it.

10 Q And the fermenting process used at Bio-Systems, I
11 think you'd agree, is not pharmaceutical grade; correct?

12 A Correct.

13 Q And before you inspected the Beloit plant and its
14 processes, you had never inspected or even seen another
15 facility that was growing microorganisms for use in
16 products like those produced at Bio-Systems; isn't that
17 correct?

18 A That's correct.

19 Q And LexaMed, in reaching its conclusions, made the
20 assumption that the trigger for sporulation with the
21 wet-batch process was dessication and drying out;
22 correct?

23 A And depletion of nutrients because there are some
24 nutrients ended there, too, because you wanted to
25 increase that count a little bit to get to your final

ROBERT REICH - CROSS

1 spore count. So it would be a combination of nutrient
2 depletion and the drying process.

3 THE COURT: Because we've got these two terms,
4 was your last question related to spoliation or
5 sporulation?

6 MR. BIANCHI: Sporulation. I got too many
7 "L's" in there.

8 THE COURT: We're going back and forth on this
9 and I want to make sure. What we've been talking about
10 is sporulation, which I understand to mean a growth or
11 the development or growth of the spores; is that
12 correct?

13 THE WITNESS: Sporulation, yes.

14 THE COURT: Thank you.

15 MR. BIANCHI: And I've only intended to say
16 sporulation as well.

17 THE COURT: Understood. Why don't you spell it
18 for the record.

19 THE WITNESS: S-p-o-r-u-l-a-t-i-o-n.

20 THE COURT: Thank you.

21 BY MR. BIANCHI:

22 Q And did LexaMed decide what the trigger was for
23 sporulation in the wet-batch process or was it told what
24 the trigger should be?

25 A I don't recall. I mean I believe that that's what
ROBERT REICH - CROSS

1 the trigger was, but I probably was -- I probably was
2 told that by Neil as well, but I can't swear to that.

3 Q Can we pull up the first report that he had. I'm
4 looking at 00007. If you look at that top paragraph, so
5 I'm on LexaMed four zeros and a 7. This is in Exhibit
6 20.

7 And if you go about two-thirds of the way down,
8 there's a sentence that starts "The first drying step
9 involves..."

10 A Yes. "The first drying step involves 24 hours in a
11 dry room operated at 30 to 35."

12 Q Degrees Celsius. And you recall you were provided
13 with that temperature; isn't that right?

14 A Correct.

15 Q And I believe it's LexaMed 64, Table 5. So if you
16 look at this page, 00064, it says at the top of the
17 table, each of the tables -- let's pick Table 7. It
18 says "IP batch populations after 24 hours at 37 degrees
19 Celsius." Do you see that there?

20 A Yes.

21 Q So at one time, LexaMed was told that after
22 fermentation bacteria was stored at 30 to 35 degrees
23 Celsius, and then later it was sold 37 degrees Celsius;
24 isn't that right?

25 A I guess I think if you -- as an attachment to this
ROBERT REICH - CROSS

1 report is that Neil sent us a synopsis of that so we
2 can --

3 Q And my question is simpler than that.

4 A Oh.

5 Q The temperature in Exhibit A that we first looked
6 at, page 7, is different than the one that was used in
7 -- page 64 to do that portion of the report; correct?

8 A Yes.

9 Q Okay.

10 A If that -- Yes. That's what I was told, 30 to 35.
11 And this was done at 37.

12 Q Correct. And they were both testing the wet-batch
13 process though; right?

14 A Correct.

15 Q And if you change even one condition in the process
16 like the temperature, it can create a domino effect that
17 changes other portions of the process; isn't that right?

18 A It could. This was a drying process. This
19 might -- if it's a two degrees difference, it may dry a
20 little faster. But --

21 Q And when LexaMed tested the wet-batch procedure in
22 its laboratory in July 2012, it only ran through the
23 process once; right?

24 A Correct.

25 Q In mixing different bacteria strains, that can
ROBERT REICH - CROSS

1 affect the plate count of the products; correct?

2 A I'm not sure what you mean. If you have a mixed
3 culture and you're doing a plate count?

4 Q Yes. If you're trying to plate -- do a plate count
5 with a product that is a mixture of various bacteria,
6 that can make it difficult to do the plate count --

7 A No --

8 Q -- correct?

9 A -- it wouldn't make it difficult to do the count.
10 You do the proper dilutions, you're going to count the
11 colonies. I don't --

12 Q So having different bacteria strain will not affect
13 the plate count of the product?

14 A It shouldn't if you're incubating properly, and
15 they all grow within that, you know, on the medium on
16 the incubation temperatures. Very seldom in real life
17 are you dealing with pure cultures especially. A lot of
18 times you're dealing with mixed cultures when you're
19 plating.

20 THE COURT: You would expect the plate count to
21 be the same for Bacillus and Pseudomonas --

22 THE WITNESS: You could tell --

23 THE COURT: If you were able to provide a pure
24 sample, you would expect their development to be the
25 same under the same conditions?

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1 THE WITNESS: If you had a mixed culture of
2 Bacillus and Pseudomonas --

3 THE COURT: Not a mixed culture. One of each.

4 THE WITNESS: Okay. You have one of each.

5 THE COURT: Two separate substrate or two
6 separate medium.

7 THE WITNESS: Okay.

8 THE COURT: And you treated them totally the
9 same: Heat, temperature, time. You would expect them
10 to develop at the same rate? I thought every bacteria
11 developed at different rates.

12 THE WITNESS: They do, but when you're looking
13 at colonies, you might have some different. Some of the
14 Bacilli might grow faster. Pseudomonas is a very fast
15 grower under ideal conditions. So you would think that
16 they'd grow more or less the same if you did them --

17 THE COURT: More or less --

18 THE WITNESS: They would look different --

19 THE COURT: I'm sorry. The question was would
20 they develop the same; at the same rate.

21 THE WITNESS: They would develop at comparable
22 rates. I can't say they would be exactly --

23 THE COURT: That's fine. Next question,
24 Counsel.

25 THE WITNESS: -- the same.
ROBERT REICH - CROSS

1 MR. BIANCHI: Your Honor, can I give him his
2 deposition?

3 THE COURT: Yes.

4 THE WITNESS: I hope I don't have to read all
5 that right now.

6 MR. BIANCHI: No.

7 THE COURT: Do you have a specific page
8 reference?

9 MR. BIANCHI: Yes.

10 BY MR. BIANCHI:

11 Q I'm going to have to you turn to page 137. And
12 it's -- let me know when you're there and I'll give you
13 the line.

14 A I'm there.

15 Q Okay. And just be clear, you recall you were
16 deposed back in -- it's been awhile -- back in July,
17 July 25 of 2013; correct?

18 A Correct.

19 Q And when you were deposed, you were under oath; is
20 that right?

21 A Correct.

22 THE COURT: The Court will take judicial notice
23 of that. You don't need to go through the litany, and
24 I'd ask you to ask your impeaching question.

25 BY MR. BIANCHI:

ROBERT REICH - CROSS

1 Q On line 17. I'm going to read it. You were asked:

2 "Question: And the mixing, that would affect
3 the plate count and the total count; correct?"

4 And your answer was: "It could, sure. It could,
5 because you're blending it with something else that has
6 a number of organisms too."

7 Did I read that correctly?

8 A Yes. Let me read the content sentence in.

9 THE COURT: You've answered the question. Your
10 counsel can elaborate. You should ask your next
11 question, Counsel.

12 THE WITNESS: Oh, okay.

13 BY MR. BIANCHI:

14 Q Before LexaMed tested Bio-Systems' products, it had
15 never before even tested a septic or waste treatment
16 plant product for stable stability profile; isn't that
17 right?

18 A That's correct.

19 Q And I believe you already said this, but just to
20 confirm, the product systems LexaMed examined were
21 received from Bio-Systems; correct?

22 A That is correct.

23 Q LexaMed sometimes does send people to test on
24 location; isn't that right?

25 A We do.

ROBERT REICH - CROSS

1 Q But in this instance you did not do that?

2 A We did not.

3 Q And in fact, LexaMed doesn't know where the samples
4 were taken from exactly; isn't that right?

5 A No. We went with what the samples were labeled and
6 sent to us with, telling us what they were. But we
7 weren't there when the samples were taken.

8 Q And you don't know how the samples were taken;
9 isn't that right?

10 A Correct.

11 Q And so all of LexaMed's results and data are based
12 on assumptions that the Beloit plant had properly taken
13 and handled the samples; isn't that right?

14 A Correct.

15 Q And you, being LexaMed, did not know if Bio-Systems
16 sent bacteria that was still in the vegetative state as
17 opposed to bacteria that had already reached the spore
18 form; correct?

19 A No. We only knew what they told us. We don't
20 know.

21 Q So no, you didn't know whether it was vegetative
22 or --

23 A No.

24 Q And if they had sent vegetative bacteria, there's a
25 greater chance that the bacteria would have died during

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1 shipment; isn't that right?

2 A There would be -- yes, there's a greater chance the
3 veggies would die then in the spore form, that's
4 correct.

5 Q LexaMed did not test to see if the products it
6 received from Bio-Systems still functioned after a
7 two-year time; isn't that right?

8 A Correct. Like we said before, we did not test
9 functionality in terms of remediation of any sort of
10 problems.

11 Q And because LexaMed tested products that were
12 shipped from Bio-Systems, it could have obtained a
13 different count than if it had went on site and plated
14 samples right there at the Beloit plant; isn't that
15 right?

16 A If there was a loss of vegetative cells, yes, we
17 would not have been able to detect that. The spore
18 formers would have been stable.

19 Q And the spore count that LexaMed did was based on
20 mature spores that would have shown heat resistance;
21 isn't that right?

22 A Correct.

23 Q And therefore LexaMed was looking for the spore
24 count on products, not the total count.

25 A We did both, if you look at our reports.

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1 Q And so total count isn't total spore count?

2 A No. There's a total count and a total spore count.
3 The spore count is a subset of the total count.

4 Q And there could have been immature spores that were
5 destroyed in the testing process; isn't that right?

6 A Correct.

7 Q And immature spores could have matured into a
8 mature spore if they had not been exposed to high heat;
9 isn't that right?

10 A That's a possibility, yes.

11 Q Isn't it true that the more samples taken, the
12 better chance one has of getting a true representation
13 of the overall picture of a product?

14 A Yes.

15 Q And the same is true for running a procedure;
16 correct?

17 A You mean how many replicates you would run in a
18 procedure?

19 Q Yes, sir.

20 A Yes.

21 Q And with a smaller number of samples, there's a
22 chance that the results may not be representative of the
23 original sample; correct?

24 A That's a possibility depending on the sampling.

25 Q And you understood that Bio-Systems was using a
ROBERT REICH - CROSS

1 spread plate method, specifically using a spiral plater
2 and an automatic counter to plate and count its
3 bacteria; correct?

4 A Correct.

5 Q And you yourself had never used a spiral plater or
6 an automatic counter before; right?

7 A We used automatic counters all the time, but we
8 don't at LexaMed. But I've use automatic counters and
9 we have validated automatic counters. I have not used a
10 spiral plater myself.

11 Q It is an acceptable and valid method to plate and
12 count bacteria using a spiral plater and automatic
13 counter; correct?

14 A Yes.

15 Q And I believe you noted earlier that it can be
16 difficult to differentiate species of the genus
17 Bacillus; isn't that right?

18 A Correct.

19 Q So if several Bacillus species are in a product, it
20 would be difficult to tell one from the other even on a
21 microscope; correct?

22 A Yes. Microscopically you couldn't tell. Well,
23 some Bacillus are bigger than others, but generally
24 microscopically you couldn't differentiate.

25 Q And you knew Neil Seeger outside of this
ROBERT REICH - CROSS

1 relationship with Bio-Systems; correct?

2 A Yes. I -- Neil Seeger, it's funny, was the son --

3 THE COURT: At this point there's just a yes
4 and you've answered it. Any more questions for this
5 witness?

6 MR. BIANCHI: Last question.

7 BY MR. BIANCHI:

8 Q You specifically gave him his first job out of
9 college --

10 A I did --

11 Q -- as a favor; correct?

12 A -- yes.

13 MR. BIANCHI: No further questions.

14 THE COURT: I'll allow redirect. Let me ask
15 one thing. Let me just ask one thing. You started out
16 early on by defining Bacillus and Pseudomonas, which I
17 understand to be two bacteria strains. Was there some
18 other reason why that's significant, those two strains
19 are significant?

20 THE WITNESS: Yeah, because that's what they
21 were purported to have in their products.

22 THE COURT: So the targeted bacteria, those
23 were the two and you were just defining it for that
24 purpose. It wasn't that one is more capable of
25 producing spore forms or more capable of vegetative

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1 form. That wasn't your reason for defining them.

2 THE WITNESS: No, I was defining because those
3 were the organisms in question with this product.

4 THE COURT: Thank you. Thank you. Redirect.

5 MR. NACKOWICZ: Thank you, Your Honor. (10:16)

6 REDIRECT EXAMINATION

7 BY MR. NACKOWICZ:

8 Q Notwithstanding the fact that you've worked in the
9 medical and pharma industries heretofore, you still
10 dealt with the Bacillus and Pseudomonas that we've been
11 talking about; correct?

12 A Yes, routinely.

13 Q Mr. Bianchi talked a little bit about process
14 earlier. Will every change to a bacteria-growing
15 process materially change the outcome?

16 A Would you repeat that again, please?

17 Q If you have a bacteria-growing process, will every
18 single change materially affect --

19 THE COURT: Will minor changes --

20 Q -- the outcome?

21 THE COURT: -- change, materially change --

22 THE WITNESS: Not necessarily.

23 THE COURT: -- results?

24 THE WITNESS: Not necessarily.

25 THE COURT: Next question.
ROBERT REICH - REDIRECT

1 BY MR. NACKOWICZ:

2 Q There was a variance that was called to your
3 attention earlier, 35 degrees versus 37 degrees. Do you
4 think that that's a material difference?

5 MR. BIANCHI: Objection. It was 30 --

6 THE COURT: I'm sorry, the objection is --

7 MR. BIANCHI: Misstates what I asked.

8 THE COURT: -- misstates the testimony? Well,
9 he's not doing that, so you can ask the question.

10 BY MR. NACKOWICZ:

11 Q Is there any indication that this temperature
12 variance that was called to your attention had a
13 material effect on the outcome?

14 A No.

15 Q At this point, has your conclusion that the
16 wet-batch process is not scientifically valid and
17 appropriate on an industrial scale changed at all?

18 A No.

19 MR. NACKOWICZ: That's all I have. Thank you,
20 Your Honor.

21 THE COURT: Let me clarify that. I thought you
22 had indicated the wet-batch process, if done properly,
23 might be an effective method. But as done here by
24 Bio-Systems, it was not. Did I misunderstand that?

25 THE WITNESS: That's true. I mean you can --
ROBERT REICH - REDIRECT

1 their solid state fermentation certainly is a utilized
2 process. The way it was -- certainly the way it was
3 described to me and what I observed here, in my opinion
4 it was not scientifically valid and it wouldn't
5 reproducibly --

6 THE COURT: Understood. You may step down
7 then. Thank you.

8 THE WITNESS: Do I leave this here?

9 THE COURT: You may. Yes.

10 (Witness excused at 10:19 a.m.)

11 THE COURT: At the break it will be retrieved.
12 Before we call our next witness, let me just clarify a
13 couple -- please be seated. For purposes of making your
14 record, Exhibit 20 is not coming in, as I've indicated.
15 If there are specific tables that have been referenced
16 by a witness and you can reach agreement with the other
17 side, going forward I would ask you to just designate
18 those tables and those tables are legitimately brought
19 in if they represent summaries of data that an expert
20 relied upon. But I'm not going to let in the entire
21 exhibit.

22 What was the understanding on CVs? That both sides
23 would simply submit CVs and they be made exhibits? I
24 didn't follow that.

25 MR. BIANCHI: My understanding was that we

1 basically agreed that the experts, the people who were
2 actually experts listed on the document, that we agreed
3 that they were qualified to testify what was in the
4 report and so you didn't need to lay a foundation about
5 qualifications.

6 THE COURT: I understand. And that makes
7 sense. With that said, if the parties can reach
8 agreement with respect to Mr. Reich's testimony on
9 specific tables, you can make those part of the record.
10 You just need to properly label them and I would suggest
11 you do it as Exhibit 20A, Exhibit 20B, Exhibit C, and
12 then make a record of what it was that was put into
13 evidence by virtue of reference.

14 The other thing is is neither side going to use the
15 document imager?

16 MR. BIANCHI: We were going to. The ELMO?

17 THE COURT: Yes. Unfortunately the document
18 image is directly behind, is it Ms. Gehrig?

19 MS. VERNON: Kaylynn Vernon. I'm just the
20 legal assistant.

21 THE COURT: You're not just the legal
22 assistant. Oftentimes you're the most important person
23 in the room, but that's not my point. My point is
24 you're going to have to rearrange so we can get access
25 to the document imager.

ROBERT REICH - REDIRECT

1 Okay. I think that's all the Court had. I'm going
2 to take our morning break now and we'll reconvene at 25
3 to unless counsel have more issues, and then we'll
4 reconvene a little later.

5 Anything more for the plaintiffs at this time?

6 MR. NACKOWICZ: No, Your Honor. Thank you.

7 THE COURT: Anything for the defendants?

8 MR. BIANCHI: No.

9 THE COURT: All right. Then let's -- we'll
10 take a 15-minute -- let's make it simple. At 20 to 11
11 we will reconvene. So 10:40. We're in recess and feel
12 free to move about as you wish.

13 (Recess 10:22-10:40 a.m.)

14 THE COURT: Please be seated. And you may call
15 your next witness.

16 MR. JACKSON: Thank you, Your Honor. Paul
17 Betz.

18 THE COURT: You can actually come here and the
19 clerk can swear you in if you'd just raise your right
20 hand.

21 **PAUL BETZ, PLAINTIFF'S WITNESS, SWORN,**

22 THE COURT: You may proceed, Counsel.

23 DIRECT EXAMINATION

24 BY MR. JACKSON:

25 Q Sir, would you state your name and address.
 PAUL BETZ - DIRECT

1 A Paul Betz. 16004 Trebbio Way. Naples, Florida.

2 Q And you are the CEO of Betco?

3 A Correct.

4 Q Could you briefly tell us what Betco is and what it
5 does?

6 A It's a 65-year-old family business started by my
7 parents in 1950. We manufacture a variety of cleaning
8 chemicals and cleaning equipment.

9 Q And how long have you been employed by Betco?

10 A Officially since 1974, but there were a few years
11 before that through school and things. So since 1974.

12 Q And you're a graduate of Notre Dame?

13 A Correct.

14 Q What year?

15 A 1974.

16 Q And then you went with the family business?

17 A Yes.

18 Q All right. I'd like to focus your attention on the
19 period starting with the acquisition by Betco of
20 Bio-Systems and ending with the time that Malcolm
21 Peacock left. All right?

22 A Okay.

23 Q Before I do that, on the screen is Exhibit 1.

24 Would you look at the screen to your right -- to your
25 left. Do you see Exhibit 1?

PAUL BETZ - DIRECT

1 A Yes.

2 Q Would you identify that, please.

3 A That is the confidential business memorandum.

4 Q And that was delivered to you or to Betco?

5 A Correct.

6 Q By Cornerstone?

7 A Correct.

8 Q And was that considered by Betco in its acquisition
9 of Bio-Systems?

10 A Yes.

11 Q All right. Showing you on the screen which is
12 Exhibit 771, would you identify what is that document?

13 A That's the Asset Purchase Agreement between Betco
14 and Bio-Systems.

15 Q And did you sign that document on behalf of Betco?

16 A Yes, I did.

17 Q And do you know who signed the document on behalf
18 of the sellers?

19 A I'm sure it was Malcolm Peacock.

20 Q All right. Following acquisition of Bio-Systems,
21 did Mr. Peacock have a role in the Beloit operation?

22 A Yes.

23 Q What was his role?

24 A He was president.

25 Q And what were his duties and responsibilities?
PAUL BETZ - DIRECT

1 A He was directed to continue to run the business as
2 he had run it up until the point that we bought it. All
3 the functions reported to him. And basically it was --
4 it appeared to be a profitable, well-run business, and
5 my direction was just keep doing what you've been doing.
6 Keep running it. Everybody reports to you. You run the
7 business.

8 Q Were there any restrictions on Mr. Peacock's
9 operation of the business?

10 A No. My direction was you gave us a sales
11 projection, you gave us a profit projection. Those are
12 your only really two measurements I'd like you to look
13 at. Keep running the business. And then I was involved
14 with him -- even before we bought the business, we
15 realized -- we had addressed, Malcolm and I, felt the
16 business could grow with a greater sales initiative. So
17 my involvement with him would be to converse with him
18 occasionally on trying to develop a sales program.

19 Q Thank you. To whom did Mr. Peacock report?

20 A To me.

21 Q And to whom did the Bio-Systems' employees report?

22 A To Mr. Peacock.

23 Q And Beloit has now been -- I'm sorry. Bio-Systems
24 has now been owned by Betco for almost five years and
25 it's located in Beloit?

PAUL BETZ - DIRECT

1 A Correct.

2 Q Who was the owner of the building?

3 A Mr. Peacock and probably with his wife.

4 Q And Betco pays rent to Mr. Peacock?

5 A That is correct.

6 Q And has Betco in the almost five years timely and
7 properly paid its rent?

8 A I believe so.

9 Q As part of the purchase and sale, Mr. Peacock was
10 to be employed by Bio-Systems for two years; correct?

11 A That is correct.

12 Q In the discussions or leading up to the Asset
13 Purchase Agreement, whose request was that he be
14 employed for two years?

15 A That was Mr. Peacock's request from the very first
16 conversation, that he would like to stay there for two
17 years and continue to run the operation.

18 Q Did there come a time when Mr. Peacock left?

19 A Yes.

20 Q When was that?

21 A I believe it would be around November in 2011.

22 Q And what were the circumstances of his leaving?

23 A We realized that he was going to run the business
24 for two years, but we also realized that we had to
25 anticipate that after two years we would be running the

PAUL BETZ - DIRECT

1 business. And so in anticipation of starting to learn
2 the business, we then hired a couple of people, Chris
3 Pavain and John Yazek to become involved with the
4 business.

5 And so as part of a transition, it was best that
6 Mr. Peacock stay home, be available as a consultant, but
7 allow our people to now learn the business.

8 Q And that was in November of 2011?

9 A Yes.

10 Q And did you have a conversation with Mr. Peacock in
11 which you related to him what you've just related to me?

12 A Yes.

13 Q And was Mr. -- what was Mr. Peacock's reaction?

14 A I think just fine. I don't remember anything other
15 than that.

16 Q And that's --

17 A I think he understood he wasn't going to be there
18 forever and we needed to do what was necessary to turn
19 things over to our people eventually.

20 THE COURT: I didn't quite follow the asking
21 him to stay home. What was the purpose in that?

22 THE WITNESS: To go into a consulting role.

23 THE COURT: I understand. But there's no
24 reason why he can't consult from an office in the
25 building. I'm trying to understand why you said stay

PAUL BETZ - DIRECT

1 home.

2 THE WITNESS: He was running the business. All
3 the people reported to him. As long as he was there, it
4 was difficult for us to put our people in. And so we
5 were in the middle of changing the command, so to speak,
6 and with him still being there, it was difficult for the
7 employees. They were getting mixed messages.

8 THE COURT: So when you met with him, had you
9 already had some people on site? When you met with him
10 to tell him you're moving to a consulting role, you
11 can't be here, had you already had people on site?

12 THE WITNESS: Just for a very short period of
13 time.

14 THE COURT: So where did this come from, this
15 problem with this tension? Why did you believe there
16 was going to be tension?

17 THE WITNESS: I'm not so sure I know the answer
18 to that question.

19 THE COURT: That's fine. You may continue.

20 THE WITNESS: It's about four-plus years.

21 THE COURT: Understood.

22 THE WITNESS: Can I answer that question?

23 THE COURT: Sure.

24 THE WITNESS: I mean I don't know that there
25 was any tension, it was just -- it was just time. I

PAUL BETZ - DIRECT

1 mean it was -- he couldn't continue being the leader and
2 be there. I don't know that we -- there was any --
3 maybe we were -- we didn't have any tension, but we just
4 felt it was appropriate that now our people started to
5 learn the processes and the procedures in the business.

6 THE COURT: Next question.

7 THE WITNESS: Rather than go up to two years
8 and --

9 THE COURT: I understand. You've answered the
10 question. You may ask your next question.

11 MR. JACKSON: Thank you, Your Honor.

12 BY MR. JACKSON:

13 Q Did there come a time when Betco terminated
14 Mr. Peacock?

15 A Yes.

16 Q And when was that?

17 A I believe in April of 2012.

18 Q And please tell the Court what the circumstances
19 were and why you terminated Mr. Peacock.

20 A Well, during that period between November and
21 April, we started learning things that were inconsistent
22 with the way we thought the business was being managed
23 and it became counterproductive to have him involved in
24 any way.

25 Q Specifically what did you learn?

PAUL BETZ - DIRECT

1 A I think one of the very first things was he wanted
2 to raise everybody across the board 30 percent and --

3 THE COURT: Raise their salaries?

4 THE WITNESS: Raise across the board everyone's
5 salary 30 percent, and that was in my mind rather
6 inconsistent with trying to hit a sales-and-profit
7 number if you're going to increase the wages 30 percent.
8 So that was one indicator that something was awry.

9 BY MR. JACKSON:

10 Q Were there more?

11 A There were other concerns starting to come out from
12 various people. You know, employees that were reluctant
13 to apparently talk to us before were starting to tell us
14 some things that they felt we needed to know.

15 Q Specifically what?

16 MR. BIANCHI: Objection. Hearsay.

17 MR. JACKSON: There will be other witnesses who
18 will be offered, Your Honor, who will link this up.

19 MR. BIANCHI: My objection is --

20 THE COURT: Just a minute. I won't accept it
21 for the truth of the matter asserted, but you can answer
22 the question.

23 THE WITNESS: Okay. So what was the question
24 again?

25 THE COURT: What did employees start telling
PAUL BETZ - DIRECT

1 you?

2 THE WITNESS: This was -- this was direct to me
3 and where we were -- and I forget if it was Chris Pavain
4 or John Yazek were saying we can't produce the bacteria
5 that we need to produce to make the shipments. And so
6 I'm like why not? Well, we do not have the capacity.

7 And then I believe I went over there and talked to
8 them, I said "Well, why didn't you tell us?"

9 We were directed to not tell you."

10 BY MR. JACKSON:

11 Q During the time that Mr. Peacock ran the plant, did
12 you have an understanding of the testing procedures that
13 were being undertaken in Beloit?

14 A Only from a very high level.

15 Q Well, did you have an understanding?

16 A Yes. I mean --

17 Q What was that understanding?

18 A Well, on my very first tour of the facility, I
19 asked how do we know -- what --

20 Q Who did you ask?

21 A Malcolm.

22 Q Thank you.

23 A I went through the facility with Mr. Peacock and
24 specifically said "You're growing bacteria. How do you
25 know what you're growing? How do you know it's the

PAUL BETZ - DIRECT

1 right bugs?" And I was -- you know, then had a tour of
2 the laboratory. I was shown --

3 Q Did he respond to your question --

4 THE COURT: Before you go on, we don't have any
5 setting or time frame. When was this? Was this before
6 or after the APA was signed?

7 THE WITNESS: This would have been before the
8 API was signed.

9 THE COURT: APA, right.

10 THE WITNESS: Before the API -- A was signed.

11 THE COURT: Asset Purchase Agreement, APA.

12 THE WITNESS: Yes.

13 THE COURT: Thank you. Next question.

14 BY MR. JACKSON:

15 Q What did he tell you with regard to testing?

16 A We test everything, and were I so certified to
17 guarantee or verify that the testing is being completed.

18 Q Did anything change with regard to your
19 understanding after you acquired the Beloit plant and
20 the operation at Bio-Systems?

21 A Not that I'm aware.

22 MR. JACKSON: Your witness. (10:55 a.m.)

23 CROSS-EXAMINATION

24 BY MR. BIANCHI:

25 Q Mr. Betz, before Betco purchased Bio-Systems, it
PAUL BETZ - CROSS

1 was buying microorganisms from Novozymes; is that
2 correct?

3 A Correct.

4 Q And in purchasing Bio-Systems, Betco began
5 purchasing those same microorganisms from Bio-Systems.

6 A Correct.

7 MR. BIANCHI: Your Honor, may I approach?

8 THE COURT: You may, but hopefully we won't
9 have to continue to do this. That's why we took the
10 break.

11 MR. BIANCHI: I didn't realize it was locked.

12 THE COURT: I understand that. Let's continue,
13 please.

14 BY MR. BIANCHI:

15 Q Mr. Betz, do you recall seeing Exhibit 526 before?

16 A I don't know.

17 Q You don't know?

18 A I mean it's three pages. I'd have to read it.

19 THE COURT: Why don't you look it over and then
20 you can answer the question if you've seen it before.
21 We're off the record for a second. The witness is
22 looking at this. Let me know when you're ready to
23 discuss the document.

24 (Pause)

25 THE WITNESS: I don't remember if I've seen
PAUL BETZ - CROSS

1 this before or not to be honest.

2 THE COURT: Let's go back on the record. Your
3 answer is you don't remember if you've seen this
4 document before.

5 THE WITNESS: Correct.

6 THE COURT: Next question.

7 MR. BIANCHI: I'm going to give him his
8 deposition.

9 THE COURT: That's fine.

10 BY MR. BIANCHI:

11 Q Mr. Betz, I'm going to have you turn to page 109,
12 please.

13 A Okay.

14 Q And on page 109, if you look at line 8. I'll read
15 it for you. It says Defendants' Exhibit No. PP was
16 marked. Question was asked: "Have you ever seen this
17 document before?"

18 This is PP.

19 Yes, PP. Right. This is the exhibit I was
20 referring to as something in March."

21 And if you look at the document that I handed you,
22 Exhibit 526, that's document PP.

23 THE COURT: Based on that, do you recall that
24 you saw something like this in March?

25 BY MR. BIANCHI:

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1 Q Of 2011.

2 A I don't recall if I saw this or I did not see this.

3 THE COURT: You're welcome to ask the question
4 if you wish.

5 MR. BIANCHI: Yeah. Sorry.

6 BY MR. BIANCHI:

7 Q If you turn to what's marked Betco 65986. It's the
8 last page of the document -- no, no. Of Exhibit 526.
9 I'm sorry. I apologize. And if you look at No. 2, I'm
10 going to read it for you. It says: "Have lab evaluate
11 issue of out-of-spec finished product. Colony counts
12 are consistently too low, but the product is shipped
13 anyway. Implementation of Item No. 1 may improve this."

14 Do you see that there?

15 A I do.

16 Q And this document on the front shows that it's a
17 Bio-Systems visit note from 3-15-2011 from a trip that
18 involved Joe Provolich, John Henson, Kurt Bischoff, and
19 Brett Hanus.

20 A Yes.

21 Q So, in fact, Betco was aware in March of 2011 that
22 the lab needed to evaluate out-of-spec finished product
23 and that colony counts are consistently too low but
24 product is shipped anyway; correct?

25 A That's what it says.

PAUL BETZ - CROSS

1 Q Are you aware that your employees visited the
2 Beloit plant on March 15th of 2011?

3 A Yes.

4 Q And are you aware that they drafted this document
5 that's Exhibit 526?

6 A Yes.

7 Q Before purchasing Bio-Systems, Betco was looking
8 for a microbiologist consultant; isn't that right?

9 A Before -- when was that, please?

10 Q Sure. So in the summer of 2010 while Betco was
11 looking at Bio-Systems and considering purchasing it, it
12 began looking for a microbiologist consultant; is that
13 correct?

14 A Before we bought the business, did we -- yes, we
15 did.

16 Q Yes. And the reason that Betco was looking for a
17 microbiologist consultant is because it was buying a
18 technology it did not know; is that correct?

19 A That is correct.

20 THE COURT: Let's just go off the record for a
21 second. We're off the record.

22 (Pause at 11:04 a.m.)

23 THE COURT: We're back on the record.

24 BY MR. BIANCHI:

25 Q Mr. Betz, we're going to jump back now to
PAUL BETZ - CROSS

1 document -- it's Exhibit 526, okay?

2 A That's this?

3 Q Yes.

4 THE COURT: It's also on the screen to your
5 left if you want to look to make sure you're looking at
6 the same thing.

7 THE WITNESS: Okay.

8 THE COURT: Next question, Counsel.

9 BY MR. BIANCHI:

10 Q I understand you may not recall the actual
11 document, but you were aware that your employees brought
12 these observations back to Betco that are listed in this
13 document; isn't that correct?

14 A Correct.

15 Q And that includes all the follow-ups listed on the
16 back page of the document; is that correct? Do you
17 recall those follow-ups being brought to your attention?

18 A I never got into the minutia on this. I do recall
19 some of this conversation. I believe this was addressed
20 and Malcolm even came over to Toledo maybe in a month or
21 so after that and dealt with -- tried to deal with a lot
22 of these issues. But the line here that says "people
23 get nervous when we visit," I think that was the issue
24 that we were probably somewhat reluctant to get too
25 involved at that point.

PAUL BETZ - CROSS

1 Q Mr. Betz, I'm going to have you look at the camera
2 now or the TV next to you so I can show this document.
3 This is Exhibit 506.

4 And do you recall this document, Mr. Betz?

5 A Yes.

6 Q And it is a due diligence document that was created
7 by Betco before the purchase of Bio-Systems; correct?

8 A Correct.

9 Q And we're going to look at 66837. And we're going
10 to go nine dots down. Right there. And it says "Yields
11 are never consistent. There is a cycle in which bugs
12 are fermented, measured, and then mixed. This process
13 takes more than a week."

14 Did I read that correctly?

15 A That is correct.

16 Q And Betco purchased Bio-Systems primarily because
17 it was a profitable business; isn't that right?

18 A That would be one of the reasons.

19 MR. BIANCHI: Your Honor, I move for admission
20 of Exhibit 506.

21 THE COURT: And 526?

22 MR. BIANCHI: Yes.

23 THE COURT: They are admitted.

24 BY MR. BIANCHI:

25 Q And to be clear, primarily Betco purchased
PAUL BETZ - CROSS

1 Bio-Systems because it was profitable; right?

2 A That was one of a couple of reasons.

3 Q So no, that's not the primary reason?

4 A Well, it was profitable.

5 THE COURT: Was it a primary reason or not?

6 THE WITNESS: It was one of a couple primary
7 reasons.

8 THE COURT: Next question, Counsel.

9 BY MR. BIANCHI:

10 Q And in fact, Betco was treating the purchase of
11 Bio-Systems as if it was simply purchasing a stock or an
12 asset; isn't that right?

13 A That is correct.

14 Q I'm going to show you again on the TV next to you
15 Exhibit 515. And Mr. Betz you recognize this document?

16 A Yes.

17 Q This is an email that you sent to your executive
18 team before the purchase of Bio-Systems; correct?

19 A Correct.

20 MR. BIANCHI: Move for the admission of Exhibit
21 515.

22 THE COURT: There being no objection, it is
23 admitted.

24 BY MR. BIANCHI:

25 Q I'm going to look, Mr. Betz, there's these dots on
PAUL BETZ - CROSS

1 the side. We're going to go to the third dot down. You
2 said "The technology scares me the most as it is not
3 core to Betco."

4 Did I read that correctly?

5 A That's correct.

6 Q Then right below it there's a question that says:
7 "How do we know if the bugs are current, meaning state
8 of the art, or bordering on obsolete?"

9 Did I read that correctly?

10 A Yes.

11 Q And then we're going to skip down over the really
12 -- the next *How*, it says: "How do you be sure you
13 aren't growing bad bugs?"

14 Did I read that correctly?

15 A Correct.

16 Q When Betco was deciding to purchase Bio-Systems, it
17 decided that if Mr. Peacock did not run the business
18 right, it would simply get rid of him; isn't that right?

19 A Say that again.

20 Q Sure. In purchasing Bio-Systems, Betco had decided
21 that if Mr. Peacock did not run the business, it would
22 simply get rid of him?

23 A I don't think that was ever stated.

24 Q I'm going to have you look at your deposition in
25 front of you. Turn to page 94, please. Page 94, line

PAUL BETZ - CROSS

1 18. It says: "And you still went through with the
2 business deal?

3 "Answer: Yes, I figured he could run it for two
4 years. If he didn't run it, I would get rid of him.
5 And he didn't run it properly, so I got rid of him."

6 Did I read that correctly?

7 A You did.

8 Q Upon purchasing Bio-Systems, you agreed with
9 Mr. Peacock that in most cases Kurt should not bother
10 Derek Loverich with questions; isn't that right?

11 A Probably initially only from the standpoint the --

12 Q My question is whether you said that or not.

13 That's it.

14 MR. JACKSON: Objection.

15 THE WITNESS: Out of context.

16 THE COURT: Let's stop both ways. At some
17 point after you acquired the business, did you tell --
18 and it's Mr. Loverich?

19 BY MR. BIANCHI:

20 Q Did you tell Mr. Bischoff that he should not, in
21 most cases, should not bother Derek Loverich with
22 questions?

23 A There was probably a point I said that; correct.

24 Q And upon purchasing Bio-Systems, Betco believed
25 that Mr. Loverich, Derek Loverich, probably had better

PAUL BETZ - CROSS

1 knowledge of Bio-Systems' formulas than Mr. Peacock;
2 isn't that right?

3 A I don't know.

4 Q I'm going to have you look at Exhibit 522 here.

5 THE COURT: It will be on your screen to your
6 left.

7 Q Exhibit 522, please take a look at it. And do you
8 recognize this chain email between you and Kurt
9 Bischoff?

10 A Yes.

11 Q And in the email, I'm pointing to here in October
12 26, 2010, the sentence that begins *In fact*. "In fact,
13 one thing we have identified is that Derek manages the
14 plant and does all the formulating."

15 And then I apologize, above that it says, "But
16 Derek has some good knowledge of these formulae,
17 probably better than Malcolm."

18 Did I read that correctly?

19 A That is correct.

20 MR. BIANCHI: I move to admit Exhibit 522.

21 THE COURT: There's no objection. Actually
22 it's no longer listed among your exhibits, so we could
23 treat it as impeaching. Actually I apologize. 522 is
24 admitted. No objection.

25 BY MR. BIANCHI:

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1 Q In the summer of 2012, you questioned whether Neil
2 Seeger was a good fermenter; isn't that right?

3 A Yes.

4 Q And that same summer you also questioned Neil
5 Seeger's competence; isn't that right?

6 A Yes. That doesn't mean he was incompetent. I just
7 was questioning it.

8 THE COURT: Your counsel can elaborate.

9 THE WITNESS: Okay.

10 THE COURT: Just focus on the question.

11 THE WITNESS: Okay.

12 THE COURT: If you need to -- if you can't
13 answer yes or no, then that's fine. You can explain
14 that. But if it's a straightforward question, I'd
15 appreciate answering yes or no.

16 THE WITNESS: Okay.

17 THE COURT: You don't need to elaborate.

18 THE WITNESS: All right.

19 THE COURT: Next question.

20 BY MR. BIANCHI

21 Q Can you tell us who Neil Seeger is?

22 A Neil Seeger was our microbiologist.

23 Q Was? He no longer is?

24 A No. He's left now.

25 Q And he was in 2012 the microbiologist at
PAUL BETZ - CROSS

1 Bio-Systems, the Beloit plant; correct?

2 A That is correct.

3 MR. BIANCHI: I have no further questions.

4 THE COURT: Redirect. (11:16 a.m.)

5 MR. JACKSON: Thank you, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. JACKSON:

8 Q Mr. Betz, I show you what Mr. Bianchi has marked as
9 Exhibit 515. He asked you some questions, specifically,
10 "How do we know if the 'bugs' are 'current', meaning
11 state of the art, or bordering on obsolete?"

12 Do you see that?

13 A Yes.

14 Q In your direct examination you talked about having
15 a conversation with Mr. Peacock with regard to testing
16 and that same question, did you not?

17 A Correct.

18 Q Do you know whether your conversation with
19 Mr. Peacock preceded or followed Exhibit 515, which is
20 dated July 26, 2010?

21 A This is dated July -- I can't see the top of it.

22 Q I'm sorry. The date on it says *July 26, 2010*. My
23 question is did this conversation you referenced in your
24 direct precede, that is was it before or was it after
25 July 26, 2010?

PAUL BETZ - REDIRECT

1 A It was very close to the first visit. Whether it
2 was just before it or just after it because we were
3 developing possible questions. We understood we didn't
4 know all the intricacies of this business, so we were
5 just hypothetically saying well, what are some things
6 maybe we should try to learn, probably in anticipation
7 of the visit.

8 Q Are you done?

9 A Yeah.

10 Q Okay. Thank you.

11 MR. JACKSON: Your Honor, I forgot to move the
12 admission of Exhibit 1 and 771.

13 THE COURT: Exhibit 1 and 2, which were the
14 confidential business review and the APA, was that --

15 MR. BIANCHI: It's the same thing. 771 was the
16 number on our exhibit list.

17 MR. JACKSON: Right. I think we've got it
18 double marked. If it's marked Exhibit 2 --

19 THE COURT: The question is only if it's
20 admitted or not and I'm happy to admit it under either
21 number, but I need to know what that number is.

22 MR. JACKSON: We'll use Exhibit 2.

23 MS. TURKE: 504 and 771.

24 MR. JACKSON: 504 and 771.

25 THE COURT: 504 and 771 are admitted.
PAUL BETZ - REDIRECT

1 MR. JACKSON: No further questions.

2 THE COURT: You may step down then, Mr. Betz.

3 And the plaintiff may call its next witness.

4 MR. JACKSON: Call Kurt Bischoff.

5 **KURT BISCHOFF, PLAINTIFF'S WITNESS, SWORN,**

6 DIRECT EXAMINATION

7 BY MR. JACKSON:

8 Q Sir, would you state your name and address.

9 A Kurt Bischoff. 8511 Lewis Avenue. Temperance,
10 Michigan.

11 Q And you're employed by whom?

12 A The Betco Corporation.

13 Q What is your title?

14 A I'm the Vice President of Research and Development.

15 Q And what are your duties in that role?

16 A My duties in that role are to direct the research
17 and development activities and to direct the activities
18 of the Regulatory Affairs Department.

19 Q And briefly describe your educational background.

20 A Bachelor of science. Georgia Tech. 1982.

21 Q And how long have you worked for Betco?

22 A I've worked there for 18 years.

23 Q Referring to the purchase of Bio-Systems by Betco,
24 did you have a role in that acquisition?

25 A Yes, I did.

KURT BISCHOFF - DIRECT

1 Q What was your role?

2 A My role was to do my best to assess the technology,
3 the operation, and the quality that existed in Beloit.

4 Q Did you say the quality?

5 A Quality, control, the laboratory, and make sure we
6 had instrumentation, people capable of performing tests.

7 Q And were you -- did you visit the Beloit plant
8 before the purchase?

9 A Yes, I did.

10 Q Did you have conversations with Mr. Peacock?

11 A Yes, I did.

12 Q Did you reach an understanding of the practices and
13 procedures of quality control at the Beloit plant?

14 A I did.

15 Q And would you tell the Court how you reached that
16 understanding?

17 A We spent time at the quality control lab during the
18 tour that was hosted by Mr. Peacock. Mr. Peacock
19 introduced us to the laboratory manager, Mindy Walters,
20 and then showed us various pieces of equipment that are
21 used to test the products manufactured, explained a bit
22 about how each piece of equipment that he highlighted
23 was used, and demonstrated the use of the spiral plater
24 and the ProtoCOL counter.

25 Q Did you and Mr. Peacock have a discussion with
KURT BISCHOFF - DIRECT

1 regard to the testing of product?

2 A We did during that visit to the quality control
3 lab, yes.

4 Q And what did Mr. Peacock tell you?

5 A He told us that all products were tested; that they
6 had to conform to the specifications prior to being
7 released.

8 Q During the time that Mr. Peacock ran the facility
9 after the purchase but before he left, did you have an
10 understanding of testing procedures at the Beloit plant?

11 A Yes, I did.

12 Q And what were those?

13 A That I understood what tests were performed and the
14 reasons why they were performed. They were performed to
15 identify the amount of bacteria present and also other
16 key attributes of the products that were being
17 developed.

18 Q And your understanding was based on what you've
19 just testified to?

20 A Yes.

21 Q All right. Did there come a time when you learned
22 that some of the product was not tested?

23 A Yes.

24 Q First, what did you learn with respect to the
25 testing of product? That is -- let's talk for a moment.

KURT BISCHOFF - DIRECT

1 Let me digress for a moment. What type of products did
2 Beloit produce?

3 A They produced liquids, powders, solids, gels, and
4 extruded product.

5 Q All right. And your understanding was that all
6 five of those were tested?

7 A It was my understanding that every product, all
8 five of those categories that had bacterial content were
9 tested for bacterial count.

10 Q Let's talk about the liquid product. Did your
11 understanding change at some time?

12 A Yes.

13 Q When and how did it change?

14 A My understanding changed in early winter between
15 January and March of 2012 when we first began seeing --
16 being reported issues at the Beloit facility of not
17 being able to hit counts.

18 Q Let's speak with reference to -- what about
19 focusing on liquid products. Were they being tested?

20 A The liquid products were not being tested.

21 Q The extruded products.

22 A As far as I know, the extruded products were not
23 being tested for bacterial count.

24 Q The gel products.

25 A I don't know whether the gel products were tested
KURT BISCHOFF - DIRECT

1 at that time.

2 Q I had two more and I --

3 A Block.

4 Q Sorry?

5 A The block products. It was my understanding that
6 they were being tested.

7 Q And how about powder products?

8 A My understanding was the powder products were
9 always tested.

10 Q Okay. When you say *always tested* with regard to
11 the powder products, do you recall at what point in
12 their production process they were tested?

13 A The powder products were tested twice during the
14 production period; once right after they came out of the
15 drying area to get a count, and then again after they
16 were blended into a final product. So they were tested
17 in an intermediate stage and at a final product stage.

18 Q Were you made aware of any product being shipped
19 that did not meet its label or product specifications?

20 A No. I don't specifically remember being told that
21 product was being shipped out of spec. I was told that
22 when product was low in spec, it could be reworked
23 within the facility or shipped at a lower count based on
24 other products that were available to ship in the line.

25 Q Are you familiar with the term *certificate of*
KURT BISCHOFF - DIRECT

1 analysis?

2 A Yes, I am.

3 Q Were certificates of analysis employed by the
4 Beloit plant?

5 A Yes.

6 Q And how so?

7 A Certificates of analysis were generated for
8 customers who required them and sent along, or shortly
9 thereafter, shortly after a batch was produced to the
10 final customer.

11 Q And how are certificates of analysis sent?

12 A Certificates of analysis, you fill out the
13 information generated during the quality control
14 testing. It is normally dated, signed, and then sent
15 either electronically or via conventional mail to the
16 end-user.

17 Q And the certificate of analysis shows what?

18 A It shows specific test results attributed to a
19 specific lot of product. So each product has a set of
20 specifications arranged in which it must fall and a
21 certificate of analysis will list a specific value
22 associated with that lot of product.

23 Q So it means there was a test.

24 A Correct.

25 Q And it was recorded.

KURT BISCHOFF - DIRECT

1 A Yes.

2 Q And it is of the product shipped.

3 A Yes.

4 Q And does it relate to the product in the customer's
5 hands?

6 A Yes, it does.

7 Q You're aware, are you not, that Mr. Peacock's
8 company, when he owned it, was ISO certified?

9 A Yes.

10 Q We've had some discussion of ISO certification.
11 You were here in court when I think Mr. Reich talked
12 about that?

13 A Yes.

14 Q And Mr. Bianchi had some questions?

15 A Yes.

16 Q Do you agree with the characterization of Mr. Reich
17 as far as what an ISO certification is?

18 A I do.

19 Q Was it significant in your review of the
20 Bio-Systems plant that it was ISO certified?

21 A It was significant from a standpoint that we were
22 told that certain customers required ISO certification.

23 Q Certain customers of Beloit.

24 A Correct.

25 Q And what customers were those?

KURT BISCHOFF - DIRECT

1 A Specifically Nalco and General Motors.

2 Q Were testing procedures set forth in the -- let me
3 rephrase. Did you review the ISO manual that
4 Mr. Peacock had in place during his ownership and
5 operation of the Beloit plant?

6 A Yes.

7 Q And did it reference -- did the ISO Manual
8 reference testing?

9 A Yes, it did.

10 Q What did the ISO Manual state with regard to
11 testing?

12 A What I remember specifically is it referenced that
13 each powder and each liquid product upon completion of
14 the batch needed to be brought to the quality control
15 lab for testing.

16 Q And representing what to the reader?

17 A Representing that all of those products would be
18 tested against a certain set of specifications.

19 MR. JACKSON: No further questions.

20 THE COURT: Cross-examination. (11:29 a.m.)

21 CROSS-EXAMINATION

22 BY MR. BIANCHI:

23 Q Mr. Bischoff, you believe that as part of its due
24 diligence Betco had to ensure that the technology of
25 Bio-Systems was current; correct?

KURT BISCHOFF - CROSS

1 A Correct.

2 Q And before the purchase, Betco was aware that
3 bacteria yields were never consistent; correct?

4 A Correct.

5 Q And you knew before Bio-Systems was purchased that
6 it was a smaller company in the bioaugmentation industry
7 in comparison to companies like Genesis and Novozymes;
8 correct?

9 A Yes.

10 Q And post-purchase, you were tasked with developing
11 a list of items to accomplish in the first 100 days
12 after purchase; isn't that right?

13 A Yes.

14 Q I'm going to have you look at the TV of an exhibit
15 here. It's Exhibit 521. And you recognize this
16 document, Mr. Bischoff?

17 A Yes.

18 Q And this is an email that you sent in September of
19 2010 to the executive team at Betco; right?

20 A Correct.

21 Q And some of the things that you said should be done
22 in the first 100 days was acquire formulas; right?

23 A Yes.

24 Q Thoroughly review and learn the processes for
25 growing microorganisms; right?

KURT BISCHOFF - CROSS

1 A Yes.

2 Q Down here it says "learn how to operate the lab
3 equipment"?

4 A Yes.

5 Q You did not complete this 100-day list within 100
6 days of purchase; is that right?

7 A That's correct.

8 MR. BIANCHI: Ask to move Exhibit 521 into
9 evidence.

10 THE COURT: It is admitted without objection.

11 BY MR. BIANCHI:

12 Q During July 2011, so this is after the purchase,
13 Betco began the process of having Bio-Systems produce
14 urinal pucks for Betco; correct?

15 A The work began in July. I believe production
16 started in September/October of that year.

17 Q And this project, the urinal puck project, took a
18 lot of your time between July and September 2011; isn't
19 that right?

20 A That's correct.

21 Q And in fact, it took time that could have been used
22 to complete other items on the 100-day list we just
23 looked at; right?

24 A That's correct.

25 Q And in 2011, Bio-Systems was not the only project
KURT BISCHOFF - CROSS

1 that you were working on for Betco; correct?

2 A That's correct.

3 Q In fact, your Bio-Systems' projects were one of
4 over 30 or more projects that you had on your plate in
5 2011; right?

6 A Correct.

7 Q And in fact, in late December of 2011, you were
8 still securing all the formulas from Bio-Systems; isn't
9 that right?

10 A No, that's not correct. We had all the formulas.

11 THE COURT: Does securing have some different
12 meaning than having the formulas? Do you know were they
13 secured in some way different than you had them? Do you
14 view the receiving and securing as two different things?

15 THE WITNESS: We received all the formulas. I
16 had them received. Secured, they were with Mr. Betz and
17 myself.

18 THE COURT: And is that all you would normally
19 do to secure formulas?

20 THE WITNESS: I think in terms of the
21 definition, secure meant to procure as opposed to lock
22 them up in the safe. That was my understanding.

23 THE COURT: All right. Thank you. You're
24 welcome to show it to him on the document screen if
25 that's your problem. Otherwise let's proceed.

KURT BISCHOFF - CROSS

1 BY MR. BIANCHI:

2 Q Did you seek additional help from Betco to complete
3 your 100-day task regarding Bio-Systems because you
4 decided it would be in your best interest to handle
5 Bio-Systems' technical 100-day list by yourself; isn't
6 that right?

7 A No. I'm sorry. I think we've got this confused
8 with the end of 2011 as opposed to the end of 2010.

9 Q Did I say end of 2010? I meant --

10 THE COURT: That's when he was referring, to
11 the first 100 days after acquisition.

12 THE WITNESS: Correct.

13 THE COURT: And did you decide not to ask for
14 any additional help in completing that list?

15 THE WITNESS: I don't recall whether or not I
16 sought additional help. There were a number of items
17 there.

18 MR. BIANCHI: Your Honor, may I approach?

19 THE COURT: You may.

20 BY MR. BIANCHI:

21 Q Mr. Bischoff, I'm going to have you turn to page
22 76, please. And actually we'll start on 75. Line 24.
23 Are you there?

24 A Yes.

25 Q And it says: "So you didn't want to let anybody
KURT BISCHOFF - CROSS

1 else help you, is that what you're saying?"

2 To the next page.

3 "Answer: I decided that it would be in my best
4 interests to do it myself since I am for the most part
5 the only laboratory person that handles Bio-Systems'
6 affairs."

7 Did I read that correctly?

8 A Yes, you did.

9 Q So you didn't seek any additional help to complete
10 the 100-day list; correct?

11 A This was in reference to one specific task,
12 entering all the formulas into our computer system by
13 the end of 2011. This was independent from the 100-day
14 task list.

15 Q So the 100-day list didn't say acquiring the
16 formulas on it?

17 A It did say acquire the formulas. This was another
18 task that was generated after the 100-days, enter all of
19 their formulas into our electronic system.

20 Q So Betco was relying on you to provide it with due
21 diligence work on the technology aspect of Bio-Systems;
22 correct?

23 A Yes.

24 Q And your qualifications though to evaluate the
25 manufacturing processes at the Beloit plant were, in

KURT BISCHOFF - CROSS

1 your words, rudimentary?

2 A That's correct.

3 Q In fact, some of the technical components of
4 Bio-Systems was above what you could completely
5 understand; isn't that right?

6 A Above what I could completely understand; correct.

7 Q After the purchase of Bio-Systems, you communicated
8 quite a lot over email with Dana Juul; isn't that right?

9 A Yes, it is.

10 Q You always communicated at times with Derek
11 Loverich by email after the sale; isn't that right?

12 A That is correct.

13 Q And you also spoke with Derek face-to-face when you
14 made visits to the Beloit plant; isn't that right?

15 A Yes.

16 Q And that was all throughout the year in 2011;
17 correct?

18 A Correct.

19 Q And in fact, on your trip visits to the Beloit
20 plant you were able to gain access to Neil Seeger?

21 A Yes.

22 Q Mindy Walters?

23 A Yes.

24 Q And Mindy is -- was the lab manager at Bio-Systems;
25 correct?

KURT BISCHOFF - CROSS

1 A Yes.

2 Q To Chrissy Stratton?

3 A Yes.

4 Q And do you know what Chrissy's title is?

5 A I believe she was purchasing manager.

6 Q And again to -- you had access to Derek, all to be
7 able to discuss production items; correct?

8 A Yes.

9 Q I'm going to have you look at the screen. This is
10 Exhibit No. 537. Have you seen this document before?

11 A I'm familiar with this document, yes.

12 Q And correct, it is a formula to manufacture
13 intermediate product for Bio-Systems; correct?

14 A Yes.

15 Q And this document represents some of the
16 information about Bio-Systems' processes that you
17 received from Dana shortly after the purchase by Betco;
18 correct?

19 A Yes.

20 Q And in fact, you would study the information on
21 Exhibit 537 to be able to determine how the products
22 were manufactured at Bio-Systems; right?

23 A Yes.

24 MR. BIANCHI: Ask to move 537 into evidence.

25 THE COURT: It is admitted without objection.
KURT BISCHOFF - CROSS

1 BY MR. BIANCHI:

2 Q And you, in your own words, said you did not come
3 to a comfortable understanding of Bio-Systems' formula
4 system until December 2011; isn't that correct?

5 A That's correct.

6 Q I'm going to put Exhibit 538 on the camera here.
7 There's a couple pages, so I'm going to have to go
8 through it. But on the first page do you recognize this
9 document?

10 A Yes, I do.

11 Q And it's a procedure for making a batch of bacteria
12 using the 500-gallon fermenter procedure; correct?

13 A Yes, it is.

14 Q And this information up here shows that it was in
15 the ISO Manual; isn't that right?

16 A I don't believe any of these formulas were in the
17 ISO Manual. Formulas were not part of the manual.

18 Q I'm going to turn to 63450 in here. The document
19 would be better in one long document putting together,
20 but here you see it notes various revisions to the
21 document; isn't that right?

22 A Yes.

23 THE COURT: And for the record, this is still
24 537? Exhibit 537?

25 MR. BIANCHI: Yes -- sorry. No. 538. I
KURT BISCHOFF - CROSS

1 apologize. 538.

2 BY MR. BIANCHI:

3 Q And if you go to 63451, there's dates and changes
4 made; correct?

5 A That is correct.

6 Q And on 10-26, 2011, it says "Changed procedure
7 completely and changed approved by," go to the next
8 page, and if you follow it along it's the production
9 manager; isn't that right?

10 A That's correct.

11 Q So based on this document, the procedure for
12 producing a batch of bacteria using the 500-gallon
13 fermenter was changed completely in October 2011; isn't
14 that correct?

15 A That's what the document says. I don't know
16 personally what changed.

17 Q And in October 2011, Derek Loverich was the
18 production manager; isn't that right?

19 A Yes.

20 Q Next we have Document 519.

21 MR. BIANCHI: I ask to move 538 into evidence.

22 THE COURT: It is admitted.

23 BY MR. BIANCHI:

24 Q Do you recognize the email chain that is in Exhibit
25 519, Mr. Bischoff?

KURT BISCHOFF - CROSS

1 A I do.

2 Q And was emails made, sent around August 24, 2010,
3 between you and Mr. Betz and also Tony Lyons, and then
4 the one at the very bottom is with a Barry King;
5 correct?

6 A Yes.

7 Q And here Mr. Betz suggests that Mr. King visit
8 Bio-Systems after the closing; correct?

9 A That is correct.

10 Q Mr. King never did visit the Beloit plant, did he?

11 A No, he did not.

12 Q And not bringing Mr. King in to inspect the Beloit
13 plant was a mistake; right?

14 A That's what I said in my deposition; Monday morning
15 quarterbacking.

16 Q And, in fact, Betco actually signed a consulting
17 agreement with Mr. King; isn't that right?

18 A That's correct.

19 MR. BIANCHI: I ask to move.

20 THE COURT: 519 is admitted as well.

21 BY MR. BIANCHI:

22 Q And we're going to look again at 519 here real
23 quick. So in the email, the back page is between you
24 and Mr. King. And he notes -- you sent him an email
25 with various questions; isn't that right?

KURT BISCHOFF - CROSS

1 A Yes.

2 Q In one of them you note is "The intellectual
3 property that we are purchasing are the formulas and the
4 strategic purchasing agreements that they have
5 established." Then it says "The unique combination of
6 various microorganisms to produce a desired effect is
7 essentially where the technical value lies. Is that
8 accurate or have I missed something?"

9 Did I read that correctly?

10 A You did.

11 Q And then Mr. King responds to your point about the
12 unique combinations, he says "And the unique
13 combinations of all those other commodity chemical
14 enhancers, surfactants, et cetera that go into the
15 proprietary formulations, that is the property of value
16 to you as purchaser."

17 And then in your response -- your question "Is that
18 accurate?" He says "Again, exactamundo. You perceive
19 the true value is not so much the product in the
20 container but in the performance capabilities in the
21 field."

22 Did I read that correctly?

23 A Yes, you did.

24 Q I'm going to have you look at Exhibit 544 and it is
25 an email on the first page between you and Dana, and if
KURT BISCHOFF - CROSS

1 we go all the way back through, it's a chain of emails
2 that date all the way back to Friday, October 22, 2010.

3 Do you recall this email correspondence?

4 A Yes.

5 Q And I'm going to turn to this last email. So here
6 there is a report of a plate count for Betco's push
7 product; is that right?

8 A Yes.

9 Q So here we are within a month of purchase and Betco
10 was already having one of its products shipped to
11 Bio-Systems to begin checking the plate count; correct?

12 A Yes.

13 Q And this analysis was part of a project to utilize
14 Bio-Systems' material in place of a competitor,
15 Novozymes' same material, that was in a Betco product;
16 right?

17 A Yes.

18 Q I show you now Exhibit 546.

19 MR. BIANCHI: And I ask to move Exhibit 544
20 into evidence.

21 THE COURT: It is admitted.

22 BY MR. BIANCHI:

23 Q And this is an email chain between you and
24 Mr. Peacock and there's Mr. Betz. Do you recognize this
25 document at well?

KURT BISCHOFF - CROSS

1 A I recognize the email.

2 THE COURT: I'm sorry, this is 546?

3 MR. BIANCHI: Yes, sir.

4 THE COURT: And your answer was yes? You
5 recognize this?

6 THE WITNESS: The answer was yes.

7 THE COURT: Thank you.

8 BY MR. BIANCHI:

9 Q And if we -- in this email from Mr. Peacock, he
10 says "I suggested to Paul that you spend a week here to
11 learn our processes and correct what you feel is
12 incorrect."

13 Did I read that correctly?

14 A You did.

15 Q You never did visit the plant for a week; correct?

16 A Correct.

17 Q Instead you attempted to get an understanding of
18 processes at the Beloit plant through a couple single
19 day visits; isn't that right?

20 A I would say that's incorrect in the context of the
21 exhibit. I was trying to understand how to make the
22 formulas work.

23 MR. BIANCHI: I offer Exhibit 546 into
24 evidence.

25 THE COURT: It is admitted.
KURT BISCHOFF - CROSS

1 BY MR. BIANCHI:

2 Q I'm going to have you turn to page 49 in your
3 deposition, please. And on line 3 it says "What did you
4 do about that, if anything?"

5 The answer: "I continued to try to get
6 understanding of their formulas and their processes
7 through visits to Bio-Systems.

8 Just through like single day visits; is that right?

9 That's correct."

10 Did I read that correctly?

11 A You did.

12 Q I'm going to show you Exhibit 526, which has
13 already been admitted. So you mentioned, I believe, in
14 your direct about becoming aware of products being
15 shipped out under spec and you said January of 2012?

16 A Yeah. That's my recollection, AJ.

17 Q Okay. Do you recall the visit that you made to
18 Bio-Systems on March 15 of 2011?

19 A I do.

20 Q And do you recall Exhibit 526, which is the visit
21 notes?

22 A Yes, I do.

23 Q And number 2 says, "Have lab evaluate issues of
24 out-of-spec finished products - colony counts are
25 consistently too low but product is shipped anyway.

KURT BISCHOFF - CROSS

1 Implementation of Item 1 may improve this. Bischoff."

2 Did I read that correctly?

3 A You did.

4 Q You never did have a lab evaluate the issues of
5 out-of-spec finished product until this litigation in
6 2012; isn't that right?

7 A That's incorrect. The quality control lab
8 evaluated this. I didn't have an external lab evaluate
9 it.

10 Q When you say *quality control lab*, what are you
11 referring to?

12 A The laboratory in-house at Bio-Systems.

13 Q I'm going to have you look at page 51 of your
14 deposition. Line 14 says, referring to Exhibit 526
15 here. If you go to the last page, it says *Follow-ups*.
16 It says "Have lab evaluate issues of out-of-spec
17 finished product. Colony counts are consistently too
18 low. Did you have the lab inspect the issue of
19 out-of-spec finished products?

20 I did not."

21 Did I read that correctly?

22 A You did.

23 Q So according to Document 526, someone had raised
24 with you an issue that colony counts in products were
25 consistently too low but products were being shipped in

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1 March of 2011; correct?

2 A I see the document, yes, that is correct. I don't
3 remember the "being shipped" part of it.

4 Q I'm going to now show Exhibit 566. Mr. Bischoff,
5 do you recognize this March 2011 email chain?

6 A I do.

7 Q And in the note in the email on the first part, if
8 we start here, it says by as, "As far as the follow-up,
9 I am afraid that once we indicate that out-of-spec
10 material is being shipped, that it could become a wild
11 fire."

12 Did I read that correctly?

13 A Yes.

14 Q And that is an email that you drafted; correct?

15 A That's correct.

16 Q And it references the word *shipped*?

17 A It does.

18 Q And the term *wild fire* I understand at Betco means
19 "a very high profile project that needs to be addressed
20 immediately"; isn't that right?

21 A That's correct.

22 Q As far as you were aware after the purchase of
23 Bio-Systems, Mindy Walters was in charge of the spiral
24 plater and the ProtoCOL counter; correct?

25 A Yes.

KURT BISCHOFF - CROSS

1 Q And in December 2010, you had Mindy walk you
2 through the process that Bio-Systems used to plate and
3 count bacteria using the spiral plater and the ProtoCOL
4 counter; right?

5 A Yes.

6 MR. BIANCHI: I'd ask to move Exhibit 566 into
7 evidence.

8 THE COURT: It had admitted.

9 BY MR. BIANCHI:

10 Q I show you now what is Exhibit 524. Mr. Bischoff,
11 do you recognize this November 2010 email?

12 A Yes.

13 Q So as of November 10, 2010, so we're a little over
14 a month after the purchase, you say you had "a flash
15 drive from Bio-Systems that contained the ISO Manual,
16 the mix sheets, Bio-Systems' culture sheet, private
17 label correlations, Betco pricing for products under
18 consideration, and QC information."

19 Did I read that correctly?

20 A Yes.

21 Q And your understanding is the ISO Manual documented
22 an additional detail, various of Bio-Systems' processes;
23 isn't that right?

24 A That's correct.

25 Q And you were aware that LexaMed's testing of IP
KURT BISCHOFF - CROSS

1 products were based on samples of products produced in
2 April 2010; isn't that right?

3 A In that time frame, yes. Yes.

4 Q In April 2012?

5 A April, May, June, yes.

6 MR. BIANCHI: I move to admit Exhibit 524.

7 THE COURT: It is admitted.

8 MR. BIANCHI: I have no further questions.

9 THE COURT: All right. Redirect. (11:56 a.m.)

10 REDIRECT EXAMINATION

11 BY MR. JACKSON:

12 Q Mr. Bischoff, Mr. Bianchi questioned you with
13 regard to Exhibit 526, which was a memo I think you
14 testified you produced on March 15, 2011. Do you see
15 that?

16 A Yes.

17 Q And he questioned you with regard to specifically
18 colony counts are consistently too low but product is
19 shipped anyway. When you say the product is shipped
20 anyway -- let me rephrase. What did you mean by "it's
21 consistently too low"?

22 A This report was drafted by Brett Hanus and the
23 counts coming out of the fermentation vessels were too
24 low to generate high-count powder products.

25 Q All right. When you say "high-count powder
KURT BISCHOFF - REDIRECT

1 products," what do you mean by high-count powder
2 products?

3 A Powder product, the bacteria count of 500-billion
4 colony-forming units per gram.

5 Q 500 billion or 5 billion?

6 A 5 billion. Excuse me. 5-billion-count material.

7 Q Was there powder product of Bio-Systems being sold
8 at this time that had a lower represented count?

9 A Yes, there was.

10 Q And was there a concern at this time with respect
11 to the ability to produce the lower graded or
12 lower-specked powder product?

13 A No.

14 Q When you say the product is shipped anyway -- well,
15 first of all, are those your words or are those someone
16 else's words?

17 A Those are someone else's words.

18 Q All right. Do you know what Mr. Hanus meant when
19 he used those words?

20 A Specifically I don't know what was shipped or how
21 much was shipped. I don't.

22 Q Do you know the testing procedures for Bio-Systems
23 that were in effect on March 15, 2011 -- I'm sorry, let
24 me rephrase.

25 Did you know on March 15, 2011, the testing
KURT BISCHOFF - REDIRECT

1 procedures that were in place at Bio-Systems?

2 A I am aware that there were testing procedures in
3 place and I was under the impression, I need to verify,
4 that they were exactly the same procedures and
5 specifications that were in place when we purchased
6 Bio-Systems.

7 Q And you've testified on direct that all product was
8 tested?

9 A Yes.

10 Q Do you know the source of Mr. Hanus's information
11 when he wrote "colony counts are consistently too low
12 but product is shipped anyway"?

13 A I do not know for sure. I do know that we were
14 with Neil Seeger and Derek Loverich on that.

15 Q My question is do you have personal knowledge of
16 his source of information?

17 A I do not.

18 Q And you talked with Mr. Bianchi about wild fire.
19 Specifically what were you concerned -- I'm sorry.

20 MR. JACKSON: Your Honor, Exhibit 566.

21 Q What were you specifically referencing when you
22 used the term wild fire in Exhibit 566?

23 A If there was a problem with the fermentation that
24 wouldn't allow us to get the high counts necessary to
25 produce in-spec finished goods, then this would become a

KURT BISCHOFF - REDIRECT

1 project involving a lot of resources and attention
2 devoted to solving that problem as quickly and
3 efficiently as possible.

4 Q During this time Mr. Peacock was in charge, was he
5 not?

6 A Yes, he was.

7 Q Do you know of any discussion of anybody within the
8 Betco Company with Mr. Peacock with regard to that
9 matter?

10 A No, sir.

11 MR. JACKSON: Nothing further, Your Honor.

12 MR. BIANCHI: Your Honor, may I -- very short
13 recross. (12:01 p.m.)

14 THE COURT: Very brief.

15 RE CROSS-EXAMINATION

16 BY MR. BIANCHI:

17 Q Mr. Bischoff, first did you tell Mr. Peacock about
18 the product being shipped below spec?

19 A No.

20 Q Also you talked about what you were told about
21 testing and where the products were supposed to be up to
22 snuff. Are you aware of any warranty claim by a
23 customer dating back to pre-November 2011 brought
24 against Bio-Systems?

25 A I don't have any specifics, no.
KURT BISCHOFF - RE CROSS

1 MR. BIANCHI: No further questions.

2 THE COURT: All right. You may step down,
3 Mr. Bischoff.

4 (Witness excused at 12:02 p.m.)

5 THE COURT: Plaintiffs may call their next
6 witness.

7 MS. GEHRIG: Thank you, Your Honor. The
8 plaintiff calls Mr. Derek Loverich.

9 **DEREK LOVERICH, PLAINTIFF'S WITNESS, SWORN,**

10 THE COURT: Ms. Gehrig, I presume.

11 MS. GEHRIG: Yes, Your Honor.

12 THE COURT: You may proceed.

13 MS. GEHRIG: Thank you, Judge.

14 DIRECT EXAMINATION

15 BY MS. GEHRIG:

16 Q Mr. Loverich, would you please state your name and
17 spell your last.

18 A Derek Loverich. L-o-v-e-r-i-c-h.

19 Q Sir, where do you currently reside?

20 A Popular Grove, Illinois.

21 Q Where are you employed?

22 A Bio-Systems International.

23 Q And what is your current position?

24 A Plant manager.

25 MS. GEHRIG: Your Honor, we proposed a short
DEREK LOVERICH - DIRECT

1 video. It's my understanding that the Court has already
2 reviewed it. I don't know --

3 THE COURT: I have reviewed the Loverich --
4 there's a second part that's not in evidence.

5 MS. GEHRIG: Okay.

6 THE COURT: So I haven't gone back to look at
7 that.

8 MS. GEHRIG: I don't wish to waste the Court's
9 time. If the Court has already reviewed it, would you
10 prefer we simply go straight with testimony?

11 THE COURT: I'll tell you what, I will -- I
12 will be certain to review it again. But I think I've
13 had the gist of the first portion. So I'll look at it
14 over lunch as well, but unless you think it's crucial
15 that I have exact recall of the information, I think I
16 can follow.

17 MS. GEHRIG: Thank you.

18 BY MS. GEHRIG:

19 Q Mr. Loverich, did you participate in the filming of
20 a video in May of 2015 in your workplace?

21 A Yes.

22 Q And did that video give a broad overview of what
23 you do in your current role?

24 A Yes.

25 Q Sir, how long have you been employed at the Beloit
DEREK LOVERICH - DIRECT

1 plant?

2 A Since 2006.

3 Q When you were hired who owned the plant?

4 A Malcolm Peacock.

5 Q Mr. Peacock?

6 A Mr. Peacock.

7 Q And sir, what position were you hired to fill back
8 in 2006?

9 A I started off in liquid production and supervision.

10 Q Sir, who interviewed you?

11 A Mr. Peacock.

12 Q Were other members of his family present?

13 A Yes.

14 Q And sir, were other members of his family involved
15 in the business at that time?

16 A Yes.

17 Q Specifically was his son Richard involved?

18 A Yes.

19 Q In what role?

20 A He was the production manager.

21 Q Was his daughter Lisa involved?

22 A Yes.

23 Q And what was her role?

24 A She was in the financials.

25 Q And was his wife Marilyn involved?
DEREK LOVERICH - DIRECT

1 A Yes.

2 Q What was her role?

3 A She managed the ISO Manual.

4 Q Sir, who technically did you report to when you
5 first started?

6 A Richard Peacock.

7 Q As a practical matter, who directed your day-to-day
8 activities?

9 A Mr. Peacock.

10 Q And here's where we get a little confusing. When
11 we say Mr. Peacock, are we referring to Mr. Malcolm
12 Peacock?

13 A Mr. Malcolm Peacock.

14 Q Sir, just for clarity, if we're ever referring to
15 Mr. Richard Peacock, would you specify?

16 A Yes.

17 Q Sir, what is your formal education?

18 A I have an ecology degree from Purdue with
19 environmental option.

20 Q Was this in the year 2000?

21 A Yes.

22 Q Did you have course work in microbiology?

23 A Yes.

24 Q Did you learn about fermentation?

25 A Yes.

DEREK LOVERICH - DIRECT

1 Q And did you have exposure to plate counting of
2 bacteria?

3 A Yes.

4 Q Sir, your work history, just a brief summary prior
5 to when you began working at Bio-Systems, was your first
6 job with Stratford Technology?

7 A Yes.

8 Q And sir, did that -- is Stratford Technology a
9 biological weapons proliferation prevention program?
10 Was that their task?

11 A Yes.

12 Q And sir, did this take you to areas across the
13 seas?

14 MR. BIANCHI: Objection. Leading.

15 THE COURT: I'll sustain the objection.

16 BY MS. GEHRIG:

17 Q Sir, what were your responsibilities with this
18 company?

19 A I provided biological aspect to the former by
20 weaponers.

21 Q And sir, were you exposed to different types of
22 fermentation procedures?

23 A Yes.

24 Q And equipment?

25 A Yes.

DEREK LOVERICH - DIRECT

1 Q Did you learn anything about microbiology
2 techniques in that job?

3 A Yes.

4 Q And sir, was your second job -- what did that
5 involve?

6 A Environmental field work.

7 Q And was that groundwater remediation?

8 A Yes.

9 Q How long did you remain in that position?

10 A About a year.

11 Q Sir, I'd like to talk about your initial duties
12 when you were placed in charge of liquid production.
13 What were your specific job duties?

14 A Fermentation as well as liquid production.

15 Q And sir, what basics did you already know when you
16 showed up at Bio-Systems?

17 A Some of the basics of fermentation; the math needed
18 to produce different batches.

19 Q Was the setup, the facility, new to you?

20 A Yes.

21 Q And sir, did you know how to formulate products?

22 A No.

23 Q Did you learn that when you started?

24 A Yes.

25 Q Who taught you?

DEREK LOVERICH - DIRECT

1 A Mr. Peacock.

2 Q And sir, did you over the course of time take over
3 those tasks for the liquid production?

4 A Yes.

5 Q Were you aware of other products being produced in
6 the plant other than liquids?

7 A Yes.

8 Q And what general categories?

9 A Powder products, solid products all containing
10 bacteria.

11 Q And sir, were you aware of other departments
12 outside of production?

13 A Yes.

14 Q Including quality control?

15 A Yes.

16 Q And were you aware of a sales staff?

17 A Yes.

18 Q Were they in your building or a different building?

19 A A different building.

20 Q During that time did you become aware of any
21 perceived or did you yourself observe what you would
22 characterize as equipment deficiencies in the Beloit
23 plant?

24 A Yes.

25 Q What was the main equipment deficiency that you
DEREK LOVERICH - DIRECT

1 observed?

2 A We had shortages of steam.

3 Q And sir, what equipment is steam related to?

4 A Boilers and fermenters.

5 Q How pervasive was this problem in terms of its
6 effect on your ability to do your job?

7 A It was a very large issue. It impacted being able
8 to ferment as well as produce urinal pucks, bio cubes.

9 Q Did it have any implications with regard to
10 contamination?

11 A Yes.

12 Q Could you describe that?

13 A If you don't get the fermenters up to sterilization
14 temperature in a timely manner, you can have
15 contaminants and that will impact your overall yields.

16 Q And sir, did it have any impact regarding
17 scheduling or your ability to produce product on a
18 timely manner?

19 A Yes.

20 Q And could you describe that, please.

21 A We had, due to the lack of steam, we had to
22 schedule appropriately what we would do at what time.
23 So there were times where we could not run equipment
24 because of the shortages of steam.

25 Q Did you ever have equipment competing against --
DEREK LOVERICH - DIRECT

1 one piece of equipment competing against another for
2 power?

3 A Yes.

4 Q And again, what did that do to production, your
5 ability to produce product?

6 A It slowed or stopped it.

7 Q Did you discuss these concerns with Richard
8 Peacock?

9 A Yes.

10 Q Did he share them?

11 A Yes.

12 Q And sir, did you attempt to raise these concerns at
13 that time with Mr. Malcolm Peacock?

14 A No.

15 Q Were you witness to any conversations between
16 father and son, Mr. Richard and Mr. Malcolm Peacock,
17 regarding those concerns?

18 A Yes.

19 Q And how did Mr. Malcolm Peacock respond?

20 A He didn't like what Richard was suggesting.

21 Q Sir, did your job change in 2009?

22 A Yes.

23 Q And at that time were you promoted to manager for
24 production of all processes in the Beloit plant?

25 A Yes.

DEREK LOVERICH - DIRECT

1 Q So not just liquids, were you now also in charge of
2 solids and powders?

3 A That's correct.

4 Q And sir, was this the first time, your first
5 exposure to the wet-batch process in terms of being
6 responsible for its production?

7 A Yes.

8 Q What personnel change prompted your shift in
9 responsibilities?

10 A Mr. Richard Peacock left the building or left the
11 company.

12 Q Did you observe any conflict between father and son
13 in the workplace prior to or at the time of Richard's
14 departure?

15 A Yes.

16 Q Was it verbal?

17 A Yes.

18 MR. BIANCHI: Objection. Leading.

19 THE COURT: I'll sustain that objection. He's
20 answered. You can ask your next question.

21 MS. GEHRIG: Thank you, Your Honor.

22 BY MS. GEHRIG:

23 Q How did your job duties change?

24 A I started managing powder production, solids
25 production, and liquids production.

DEREK LOVERICH - DIRECT

1 Q And sir, were you now reporting directly to
2 Mr. Malcolm Peacock?

3 A Yes.

4 Q Would you describe Mr. Malcolm Peacock's management
5 style?

6 A I worked with him every day. He was involved in
7 everything. He wanted it done his way.

8 Q Hands on or hands off?

9 A Hands on.

10 Q Did you feel you could openly suggest change or
11 criticize a procedure that he had developed?

12 MR. BIANCHI: Objection. Leading.

13 THE COURT: Sustained.

14 BY MS. GEHRIG:

15 Q Were there times that you suggested change?

16 A Yes.

17 Q How did he respond?

18 A Sometimes not favorably.

19 Q Sir, who taught you about the wet-batch process?

20 A Malcolm Peacock. Mr. Malcolm Peacock as well as
21 supporting staff.

22 Q As well as?

23 A Supporting staff.

24 Q And sir, what's your -- in general terms, what's
25 your understanding of the process, why it's a desirable

DEREK LOVERICH - DIRECT

1 process?

2 A It's a version of solid state fermentation designed
3 to give you high yields at a low cost.

4 Q In your conversations with Mr. Peacock, did he take
5 any credit for having developed that process in the
6 Beloit plant?

7 A Yes.

8 Q Did he appear to be proud of it?

9 A Yes.

10 Q Was he in any way secretive about it?

11 A Yes.

12 Q Could you describe?

13 A We would try not to have our customers see the
14 process.

15 Q In what products was the wet-batch process used?

16 A Powder products.

17 Q And sir, approximately what percentage of
18 Bio-Systems' production as of September 2010 was
19 powders?

20 A At least 50 percent.

21 Q Sir, products -- are products tested at a couple of
22 different stages?

23 A Yes.

24 Q And at what stage in production is a product
25 assigned a lot number?

DEREK LOVERICH - DIRECT

1 A When the batch sheet is made.

2 Q Okay. And if there is -- if the product is tested
3 in an intermediate level, is it assigned a lot number?

4 A Yes.

5 Q And does it get a different lot number in its final
6 stage?

7 MR. BIANCHI: Objection. Leading.

8 THE COURT: Sustained.

9 MS. GEHRIG: May I reask the question in a
10 nonleading manner, Your Honor?

11 THE COURT: You may.

12 BY MS. GEHRIG:

13 Q At what stages is a lot number assigned to product?

14 A Intermediate products get lot numbers as well as
15 final products.

16 Q Are they the same or different number?

17 A Different number.

18 Q Sir, did you have any concerns about the quality of
19 product being produced in the wet-batch process in 2009
20 or 2010?

21 A Yes.

22 Q What were your concerns?

23 A Largely concerns with moisture. We had repeated
24 issues where we could not use the product because it was
25 too wet.

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1 Q Sir, what, if anything, did the Beloit plant do
2 during that time period to dry wet-batch product?

3 A We had various racks with cardboard trays where
4 they would be used to dry. At times where they weren't
5 drying fast enough, extreme measures would be taken,
6 including dispensing the product along the floor.

7 Q The floor of what?

8 A The plant.

9 Q And sir, were you present? Did you observe that
10 happening?

11 A Yes.

12 Q And did you observe any measures taken to clean the
13 floor before the product was spread on the production
14 facility floor?

15 A It would be swept.

16 Q No other cleaning?

17 A That's it.

18 Q Sir, did you have concerns about keeping your job
19 if you criticized the wet-batch process?

20 A Yes.

21 Q Between 2006 and 2010, did you interact with staff
22 in other departments, including the lab?

23 A Yes.

24 Q How frequently would you interact with lab staff?

25 A Every day.

DEREK LOVERICH - DIRECT

1 Q And who was your primary contact?

2 A Mindy Walters.

3 Q Did you have contact with sales personnel?

4 A Yes.

5 Q And anyone in particular?

6 A Dana Juul.

7 Q How frequently did you contact Ms. Juul?

8 A Couple times a week.

9 Q Who was supervising the sales -- customer service
10 and sales staff during that time period?

11 A Mr. Peacock.

12 Q Sir, I'd like to talk to you about lab testing.
13 Were you familiar with what Mindy was doing in the lab?

14 A Yes.

15 Q And what types of test were you familiar that she
16 was conducting?

17 A The different plating testing, moisture testing,
18 there would be B.O.D., dissolution testing, pH.

19 Q Who had the last view of the products before they
20 were shipped?

21 A There would be a quality check before shipping.

22 Q And would that go through the lab?

23 A Yes.

24 Q And sir, were you aware that different tests, and
25 we're talking about bacteria tests, were occurring

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1 during different stages of the product's production?

2 A Yes.

3 Q Sir, during this time period who decided which
4 tests should be performed on which products?

5 A Mr. Peacock.

6 Q And did that -- his control of that issue, did that
7 stay the same after the plant was sold to Betco during
8 the last year he was present?

9 A Yes.

10 Q And sir, who decided at what stage each type of
11 product should be tested? I'm talking about the
12 intermediate product or the final.

13 A Mr. Peacock.

14 Q And did he continue to control that decision so
15 long as he worked in the plant, including after the sale
16 of the business?

17 A That's correct.

18 Q Now sir, in 2006 to 2009 when you had
19 responsibilities for liquid production, were you aware
20 of at what stages liquid products were being tested for
21 bacterial counts?

22 A Yes.

23 Q Was there a period of time that liquids were tested
24 in final form?

25 A Yes.

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1 Q And did that change?

2 A Yes.

3 Q Did you participate in discussions with Mr. Peacock
4 and Ms. Walters leading up to that change?

5 MR. BIANCHI: Objection. Leading.

6 THE COURT: I'll sustain that -- well, actually
7 it's preliminary and I'll allow an answer, but I need to
8 know a time frame. So maybe we could start there and
9 then you could --

10 MS. GEHRIG: Absolutely, Your Honor.

11 THE COURT: -- finish the question.

12 BY MS. GEHRIG:

13 Q In approximately 2008, did you have a conversation
14 at which Mr. Peacock was present and Ms. Walters was
15 present regarding final plate count of liquids?

16 A Yes.

17 Q What information was being brought to Mr. Peacock?

18 MR. BIANCHI: Objection. Hearsay.

19 THE COURT: It would be before Mr. Peacock. He
20 was present, so to the extent that it's preliminary to
21 asking his reaction, I'll allow it. You may proceed.

22 MS. GEHRIG: Thank you, Your Honor.

23 THE WITNESS: Repeat the question, please.

24 BY MS. GEHRIG:

25 Q What information was brought to Mr. Peacock?
DEREK LOVERICH - DIRECT

1 A I had concerns in talking with Mindy about liquid
2 product plate counts as well as shipping on time. There
3 were multiple challenges at the time and we were looking
4 for guidance on what to do.

5 Q And what did Mr. Peacock tell you?

6 A We stopped doing final plate counts for liquid
7 products and instead used the intermediate concentrate
8 counts for final products.

9 Q And sir, at that time was Mr. Peacock presented
10 with any information about whether or not plate --
11 whether or not final products were meeting spec?

12 A I don't remember.

13 Q What was his justification, if he had one, for not
14 plating final liquids?

15 A I don't remember what the justification was.

16 Q And sir, did that continue until after the sale of
17 the business and during the year that Mr. Peacock
18 remained on site?

19 A Yes.

20 Q And sir, in 2009 when your responsibilities
21 expanded, did you learn about testing practices for
22 those products as well as solids and the powders?

23 A Yes.

24 Q Sir, were some products not tested at all for
25 bacterial counts?

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1 A Yes.

2 Q Which products were those?

3 A The solid products, specifically urinal pucks.

4 Q And sir, were powders tested in their final form?

5 A Yes.

6 Q As well as IP?

7 A Yes.

8 Q When did testing take place in relation to
9 shipment?

10 A A lot of times after the product had already
11 shipped.

12 Q And sir, what was the rationale for that?

13 A Speed was the most important. We tried to produce
14 and ship as quickly as possible.

15 Q And again, who was directing those shipments before
16 testing had been completed?

17 A Mr. Peacock.

18 Q And sir, were there times that product had been
19 tested and did not pass spec and was shipped?

20 A Yes.

21 Q Sir, how frequently would product be shipped before
22 it had been tested, the final product had been tested?

23 A Probably every day.

24 Q And sir, did that practice continue during the year
25 that Mr. Peacock ran the plant after the acquisition?

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1 A Yes.

2 Q Sir, to the best of your knowledge was there any
3 consequence for basically learning after the product had
4 shipped that it hadn't passed spec in terms of a recall
5 or anything like that?

6 A My understanding was only if the customer
7 complained.

8 Q Sir, did you have concerns about these procedures
9 and policies?

10 A Yes.

11 Q Did you discuss them with Mindy Walters?

12 A Yes.

13 Q Did you attempt to address them with Mr. Peacock?

14 A Yes.

15 Q Did he appear to share your concerns about low
16 plate counts or products not meeting specification?

17 A We would be told that the products ultimately
18 worked and that at times certain customers knew what
19 they were getting and that they still worked.

20 Q Sir, you're aware of the acquisition in September
21 of 2010?

22 A Yes.

23 Q How did you become aware?

24 A Mr. Peacock told us a week or two prior.

25 Q And did you travel to Toledo?

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1 A Yes.

2 Q To meet the new owners?

3 A Yes.

4 Q Who all went on that trip?

5 A Myself, Dana Juul, Chrissy Stratton.

6 Q Sir, between 2010 and November of 2011, did you
7 continue to report directly to Mr. Peacock?

8 A Yes.

9 Q Did you believe he had the authority to fire you if
10 he chose?

11 A Yes.

12 Q Were there any immediate changes in production and
13 testing procedures September 2010 to January 2011?

14 A No.

15 Q Did you get a new staff person?

16 A Yes.

17 Q Who was that?

18 A Neil Seeger.

19 Q Did you understand he was a microbiologist?

20 A Yes.

21 Q And sir, what was your understanding of his role in
22 the business?

23 A He was to help improve process efficiency.

24 Q Did you and Mr. Seeger work together closely?

25 A Yes.

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1 Q Describe how you felt in terms of your ability to
2 share your concerns with him?

3 A I felt like I had an ally, someone that was
4 actually sharing my same concerns.

5 Q And did you, meaning you and Mr. Seeger, discuss
6 the concerns that you had about the plant?

7 A Yes.

8 Q Did you share these concerns with Mr. Peacock?

9 A Yes.

10 Q Did Mr. Peacock appear to welcome Mr. Seeger's
11 input or suggestions?

12 A No.

13 Q Did you believe you could make changes without
14 Mr. Peacock's approval?

15 A No.

16 Q Sir, were representatives of the Betco -- excuse
17 me. Were representatives from Betco present from time
18 to time in the Beloit plant?

19 A Yes.

20 Q Who did you see?

21 A Brett Hanus, Kurt Bischoff, Paul Betz, Denise
22 Lennard.

23 Q Did Malcolm in any way discourage you, or Mr.
24 Seeger in your presence, from communicating with Betco
25 personnel?

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1 A Yes.

2 Q How?

3 A Denise Lennard was not to be allowed in the
4 building, in that plant I'm talking. He wanted all
5 communication to be going through him before going to
6 Toledo.

7 Q Sir, in March of 2011 did you make any effort to
8 communicate the concerns you had about the facility
9 directly with Betco personnel?

10 A Yes.

11 Q What did you do?

12 A I went home and I typed up a letter of some of the
13 concerns that I wanted to improve on.

14 Q Sir, why did you go home to do that? Didn't you
15 have a computer at work?

16 A I feared my job would be in jeopardy.

17 Q How did you make this communication to Betco
18 personnel?

19 A I physically handed them the document.

20 Q Who did you hand it to?

21 A Kurt Bischoff and Brett Hanus.

22 Q Sir, what concerns did you put in the memo?

23 A I had concerns with fermentation, with the boiler
24 capacity, certificates of analysis, the shipping of
25 product prior to final plate specification.

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1 Q And sir, were these issues that you had previously
2 attempted to raise with Mr. Peacock?

3 A Yes.

4 Q Did you keep a copy of the memo?

5 A No.

6 Q Why not?

7 A I was worried about my job.

8 Q Did you inform Betco personnel that you were
9 concerned for your job by sharing that information with
10 them?

11 A I did.

12 Q Sir, did Betco respond in any -- to any of the
13 concerns raised in your memo?

14 A Not at first.

15 Q At some point did they have a site visit?

16 A Yes.

17 Q And did you talk to them about any -- any of the
18 issues that were raised in your memo?

19 A Yes.

20 Q Did you talk to them about --

21 THE COURT: Do you recall when that was?

22 THE WITNESS: When? I believe it was March of
23 2011.

24 BY MS. GEHRIG:

25 Q And sir, ultimately were some -- did Betco commit
DEREK LOVERICH - DIRECT

1 to assist with some improvements?

2 A Yes.

3 Q And what improvements were those?

4 A The boiler capacity.

5 Q Sir, I'm just going to ask you to look at a chart
6 that has been put up on the screen. Have you seen that
7 chart before?

8 A Yes, I have.

9 Q Does it include various items that were purportedly
10 purchased by Betco for the Beloit plant?

11 A Yes.

12 Q And sir, I'm going to represent to you that if you
13 touch the screen, it will produce an arrow. Could you
14 go through this document and point to various equipment
15 upgrades that or equipment that was upgraded following
16 the Betco visit.

17 A Okay. The water softener was part of it. And if
18 you could go to -- can I go to the next page?

19 THE COURT: You can clear that in the bottom
20 left, the arrow, if you want to get something else.

21 THE WITNESS: Bottom left?

22 BY MS. GEHRIG:

23 Q What have you pointed to, sir?

24 A I'm sorry?

25 THE COURT: She just wants you to read what you
DEREK LOVERICH - DIRECT

1 just pointed to.

2 THE WITNESS: South boiler room 1, component of
3 project 722.

4 BY MS. GEHRIG:

5 Q What was the line item purchased of that item?

6 A I'm sorry?

7 Q Does it show a cost of that item?

8 A \$70,888.04.

9 Q Okay. If we take you to the third page, are you
10 going to find some more stuff?

11 A I believe so.

12 Q Okay. You pointed to?

13 A I'm looking at south boiler room 2, component of
14 project 722. Again, the same price \$70,888. The room
15 louvers, the next one for \$2,466. The south, I'm
16 assuming boiler room, add-on project 722 for \$55,845.
17 The next one, north boiler room, I'm having trouble
18 reading it, for \$37,230. I believe that's it.

19 Q Okay. And sir, does this document also indicate a
20 date of purchase?

21 A Yes.

22 Q And either -- from your recollection, did you get
23 these items immediately after the Betco visit?

24 A No.

25 Q Was there -- what was the nature of the delay? Are
DEREK LOVERICH - DIRECT

1 we talking weeks? Months?

2 A Months.

3 Q Now sir, you initially talked about underpowered
4 boilers in the Beloit plant. Is this equipment that was
5 designed to address that issue?

6 A Yes.

7 Q And sir, did you hope or did you expect that
8 replacing the boilers would address more than one issue?

9 A Yes.

10 Q What did you think replacing the boilers or a
11 boiler upgrade would do for the Beloit plant?

12 A I thought we would -- I thought we would achieve
13 higher fermentation yields by achieving better
14 sterility, as well as not overcooking the nutrient going
15 into the fermenters. I also thought that the other
16 supporting processes could have higher production rates.

17 Q Are we talking better counts?

18 A Better counts.

19 Q And would it help with contamination?

20 A Yes.

21 Q And sir, ultimately when you did get the equipment,
22 did it help?

23 A Yes.

24 Q Did it completely solve your problems?

25 A No.

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1 Q Sir, did Mr. Peacock give you any particular
2 instruction regarding what to say to Betco personnel
3 regarding the boiler situation?

4 A I was to say that the additional boiler capacity
5 was needed due to the increased urinal puck production
6 required for Betco.

7 Q And was that accurate?

8 A That was needed to -- yes, but it was also
9 fermentation capacity for -- steam was very much needed.

10 Q Without regard to Betco's desire for additional
11 pucks, did you still need the boilers?

12 A Yes.

13 Q Did you believe that what Mr. Peacock was asking
14 you to say was true?

15 A It was true, yes, that we did need additional
16 capacity for pucks.

17 Q Did you think it was the whole truth?

18 A No.

19 Q Sir, do you recall a visit by Betco -- by a Betco
20 vice president, Chris Pavain, to the Beloit plant in
21 September or October of 2011?

22 A Yes.

23 Q And was Mr. Peacock still working in the Beloit
24 plant at the time?

25 A Yes.

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1 Q Was Mr. Peacock present when Mr. Pavain arrived?

2 A No.

3 Q Were you and Neil Seeger both at the Beloit plant
4 when Mr. Pavain arrived?

5 A Yes.

6 Q What did you do?

7 A Mr. Pavain asked for a meeting. Neil Seeger and
8 myself went up to my office and we started talking about
9 production issues.

10 Q Were you interrupted in any way?

11 A Yes.

12 Q What happened?

13 A Mr. Peacock came into the room.

14 Q And what did he do?

15 A He essentially stopped the meeting. He said that
16 -- he asked Chris, Mr. Pavain, why are you talking to
17 those two? They don't know anything.

18 Q What was your impression from Mr. Peacock's
19 actions?

20 A It made me think that he didn't want me talking to
21 Mr. Pavain.

22 Q Sir, did you understand Mr. Peacock's employment at
23 the Beloit plant to end some time in late 2011?

24 A Yes.

25 Q How did you learn of his impending departure?

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1 A Mr. Peacock came into the plant and told everyone
2 he had been fired.

3 Q Sir, did Mr. Peacock's departure change the way you
4 felt about your freedom to investigate quality control
5 issues?

6 A Yes.

7 MR. BIANCHI: Objection. Leading.

8 THE COURT: I'll sustain the objection. Strike
9 the answer.

10 BY MS. GEHRIG:

11 Q What did you do, if anything, after Mr. Peacock
12 left, differently?

13 A I began working more with Mindy Walters, Neil
14 Seeger on various components of the Beloit facility and
15 I tried to fix some of the problems that I viewed.

16 Q Did you communicate with Betco in January of 2012?

17 A Yes.

18 Q Was that in an email?

19 A Yes.

20 Q Sir, I'll direct your attention to what appears on
21 the screen and I believe has been marked as Exhibit 4.
22 Is that an email that you authored?

23 A Yes.

24 Q Did anyone assist you with regard to the content of
25 that email?

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1 A Yes.

2 Q What was the purpose of sending it?

3 A To make light of several shortcomings that I viewed
4 at the Beloit facility.

5 Q Sir, was all of this information known to you prior
6 to the time that Mr. Peacock left the plant?

7 A No.

8 Q What put it all together?

9 A I was able to work with Neil Seeger, Mindy Walters,
10 and truly put the pieces together and I learned more
11 information about each section.

12 Q What had been inhibiting that prior to Malcolm's
13 departure? Excuse me, Mr. Peacock's departure.

14 A For fear of losing my job, Mr. Peacock.

15 Q Sir, could you take your concerns and describe them
16 to us as you described them to Betco in your email.

17 A I had concerns that final products were shipped
18 before plate results were in. I had concerns that
19 liquid products were not plated in final form. I didn't
20 believe many of the products being shipped met
21 specification. And the certificates of analysis were
22 not based off of the plate counts generated from the
23 lab.

24 Q From the final product did you say? I'm sorry, you
25 trailed off.

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1 A Yes, for the final products.

2 Q And sir, is the first full paragraph under your
3 bullet points directed towards final liquids?

4 A Yes.

5 Q And what did you have to tell Betco about the
6 plating of final liquids?

7 A Well, that it wasn't done. It stopped several
8 years ago; hadn't been done for years. It was based off
9 of the intermediate count for the concentrate that was
10 used to make up the final product.

11 Q And sir, did you have some plan that you proposed
12 to Betco to deal with that issue?

13 A Yes. We were going to test several weeks of
14 products, potentially build in overages to try to use
15 existing resources to fix the problem.

16 Q And sir, your next problem, what did that concern?

17 A This was powder products using the wet-batch
18 technology to achieve plate count and specification.

19 Q And sir, did you feel like you needed to describe
20 the wet-batch process in that paragraph a little bit?

21 A Yes.

22 Q And sir, did you have concerns about contamination
23 during the production of the wet-batch products?

24 A Yes.

25 Q And sir, does your next paragraph talk about
DEREK LOVERICH - DIRECT

1 potential fixes for that problem?

2 A Yes.

3 Q What potential fixes were you proposing?

4 A Incorporate overages, higher bacterial percentages
5 going into the products to the final plate
6 specification.

7 Q And sir, the next paragraph, are you talking about
8 what's been going on, whether you've been getting
9 complaints from customers?

10 A Yes.

11 Q And you explain prior procedure?

12 A Yes.

13 Q And concerns about that as an ongoing problem?

14 A Yes.

15 Q Now sir, your last paragraph, does it reference
16 communications with salespeople?

17 A Yes.

18 Q Prior to Malcolm's departure, did you communicate
19 frequently with salespeople regarding their procedures?

20 A No.

21 Q And in this time frame, were you getting a better
22 understanding about what their procedures were?

23 A Yes.

24 Q And communicating that to Betco?

25 A Yes.

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1 Q Sir, at this time did you see yourself as basically
2 in charge of the Beloit plant?

3 A Yes.

4 Q Who did you send this email to?

5 A Can you back up to the first page? Chris Pavain,
6 Brett Hanus, Denise Lennard, and also Kurt Bischoff,
7 John Yazek, Neil Seeger, Mindy Walters, Dana Juul,
8 Gerson Artreche.

9 Q Did that include people in all departments at the
10 Beloit plant?

11 A Yes.

12 Q And your main contacts at Betco?

13 A Yes.

14 Q Sir, did you also contribute to a second email
15 dated May 16 of 2012?

16 THE COURT: How much more do you have for this
17 witness?

18 MS. GEHRIG: Approximately 10 minutes, Your
19 Honor.

20 THE COURT: Why don't we break for lunch. We
21 will reconvene at 1:30 and continue with this witness.
22 Mr. Loverich, if you'll be good enough to be back in
23 your seat at that time, I would appreciate it.

24 Anything more for the plaintiffs before we break?

25 MS. GEHRIG: We would ask that the first email
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1 be admitted into evidence.

2 THE COURT: That was Exhibit 4?

3 MS. GEHRIG: Yes, Your Honor.

4 THE COURT: All right. It is admitted.

5 Anything more for the plaintiffs?

6 MS. GEHRIG: No, Your Honor.

7 THE COURT: Anything more for the defendants?

8 MR. BIANCHI: (Shakes head no)

9 THE COURT: All right. Then we are in recess.

10 We will reconvene at 1:30. And you're free to move
11 about.

12 (Noon recess 12:38-1:37 p.m.)

13 THE COURT: My apologies for the delay. You
14 may continue.

15 MS. GEHRIG: Thank you, Your Honor.

16 BY MS. GEHRIG:

17 Q Mr. Loverich, when we left of I had just, I
18 believe, asked you if you would look at the screen which
19 has had -- which now shows Exhibit -- what's been
20 previously marked as 8. Have you seen that document
21 before?

22 A Yes.

23 Q And is that a document that was prepared by one of
24 your colleagues?

25 A Yes.

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1 Q Mr. Seeger specifically?

2 A Yes.

3 Q And did you work with Mr. Seeger to prepare the
4 information that is stated in that May 16, 2012, email?

5 A Yes.

6 Q What is this email regarding?

7 A Concerns over the ProtoCOL counter and spiral
8 plater.

9 Q And why was that a concern to you?

10 A With Neil coming in, he had more of a background in
11 manual plate counting. And when we would do the two
12 methods side by side, we weren't getting similar
13 numbers.

14 Q What was the concern?

15 A That the spiral plater was -- had much higher
16 counts compared to manual counting.

17 Q Did that create a problem in terms of
18 representations you had been making about product
19 bacteria counts?

20 A That's correct.

21 Q If what your concerns were were accurate, had you
22 been accurately representing counts to customers?

23 A No.

24 Q Sir, did you have any conversations with
25 Mr. Malcolm Peacock that caused you to believe that he
DEREK LOVERICH - DIRECT

1 was aware of a bias in the ProtoCOL counter?

2 A Yes.

3 Q And what was the context? When I say context, a
4 time frame would be helpful and what you were doing at
5 the time.

6 A I can remember one example. This would have been
7 2008 or 2009. We were doing a competitive match to a
8 Novozymes product. We had plated the product using the
9 ProtoCOL counter.

10 Q When you say "the product," is this a competitor's
11 product?

12 A That's correct.

13 Q Okay.

14 A And the results that we got were very high. I
15 asked Mr. Peacock if I should use those results for our
16 competitive match and we were advised not to use that
17 because they had spreader colonies on the plates and we
18 were to use a much lower number.

19 Q Is that the only occasion you had conversations
20 with Mr. Peacock about the ProtoCOL counter?

21 A No.

22 THE COURT: Spreader colonies means
23 nontargeted? I don't know what you mean by spreader
24 colonies or what you understood that term to be.

25 THE WITNESS: They would have been much larger
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1 colonies on the agar plates themselves so that when the
2 counter was counting them, it thought it a much higher
3 count. So it was looking for smaller cells but --
4 smaller colonies, but as it saw the bigger one, it was
5 lumping them together giving a much higher count; could
6 be ten times, could be a hundred times higher than the
7 original count.

8 THE COURT: So did you find that a plausible
9 explanation by using a lower count?

10 THE WITNESS: Yes, at the time.

11 THE COURT: Thank you.

12 BY MS. GEHRIG:

13 Q And sir, you stated that there was one or more
14 other occasions?

15 A Yes. We started experimenting -- this would have
16 been later 2010, I believe -- drying the centrifuge
17 slurry and plating the dried bacterial product after
18 that. The counts that we were getting were many
19 trillions per gram and we had discussions and we started
20 using lower counts.

21 Q And what was the nature of the discussions that
22 caused you to use the lower counts?

23 A It seemed improbable that we were getting counts
24 that high from the ProtoCOL counter.

25 Q The machine was telling you something that you did
DEREK LOVERICH - DIRECT

1 not believe was in the actual product?

2 A That's correct.

3 Q Sir, over the next two years -- and to orient you
4 we were just talking about taking us back to the email
5 dated May 16 of 2012 -- for the next two to three years,
6 2012/2013, did you work with Mr. Seeger to do anything
7 to improve the Beloit plant?

8 A Yes.

9 Q And what did you work with him to do?

10 A We tried to improve the existing wet-batch process.
11 We worked on the fermentation. We worked to replumb the
12 steam lines to improve fermentation itself. We did
13 multiple experiments on the wet-batch process to try to
14 get higher yields.

15 Q And sir, were you ultimately able to get the
16 5-billion count you needed with the wet-batch process
17 consistently in the Beloit plant?

18 A No.

19 Q And sir, what has --

20 THE COURT: I'm sorry, the 5-billion count was
21 needed for which product?

22 THE WITNESS: Using the powdered products,
23 wet-batch process was used. Many of the specifications
24 for the final product that would go out was a 5-billion
25 count product per gram.

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1 THE COURT: Was that being certified
2 previously?

3 THE WITNESS: Yes.

4 THE COURT: On a regular basis?

5 THE WITNESS: Yes.

6 THE COURT: And it's your belief now that that
7 was inaccurate.

8 THE WITNESS: Yes.

9 THE COURT: And did you believe it at the time
10 it was being certified? In 2009/2010?

11 THE WITNESS: At the time before I knew what I
12 know now about the ProtoCOL counter I believed it.

13 THE COURT: You believed it was accurate. And
14 was that tested in the local lab, the Bio-Systems lab?

15 THE WITNESS: Yes.

16 THE COURT: And using the spiral counter, that
17 is what you understood was being given back as the
18 result?

19 THE WITNESS: Yes.

20 THE COURT: Thank you.

21 BY MS. GEHRIG:

22 Q Sir, are you right now in the plant using the
23 wet-batch process?

24 A No.

25 Q What has replaced all the bacteria that you used to
DEREK LOVERICH - DIRECT

1 believe you were creating in the wet-batch process?

2 A We use spray-dried cultures now.

3 Q I beg your pardon?

4 A Spray-dried cultures.

5 Q Do you grow them yourselves or do you purchase
6 them?

7 A We purchase them.

8 Q Now sir, historically, and I'm talking historically
9 again back in the 2006 to 2010 time period, did you
10 purchase some bacteria in the Beloit plant?

11 A Yes.

12 Q Approximately how much?

13 A It varied depending on the year.

14 Q Would you characterize -- how would you compare the
15 amount that you purchased back then to the amount that
16 you purchase now?

17 A Much smaller back then. We purchase much more
18 right now.

19 Q And have you had to use purchased bacteria to
20 substitute for what you thought you were growing in the
21 wet-batch process?

22 A Yes.

23 Q Did you abruptly end the wet-batch process or did
24 you phase it out?

25 A We phased it out.

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1 Q So have bacteria purchases increased during that
2 process?

3 A Yes.

4 Q Sir, earlier in your testimony you described
5 concerns you had about spreading wet-batch product on
6 the plant floor to dry it. Did that stop after
7 Mr. Peacock left the business?

8 A It eventually stopped, yes.

9 Q Okay. Was it still occurring in the year that he
10 remained in the plant, in 2010 to 2011?

11 A Yes.

12 Q Sir, in addition to not doing that, has anything
13 else been done to make the plant a cleaner place?

14 A Yes.

15 Q What have you done?

16 A We've added additional dust collection, different
17 cleaning procedures, floor scrubbing, mopping, different
18 cleaning procedures for the equipment.

19 Q Was there any issues with ducts?

20 A Yes.

21 Q Could you tell me what that issue was?

22 A We had mold growing in the duct work and we brought
23 people in to sanitize and clean all of the duct work at
24 the plant.

25 Q When did that occur?

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1 A It's occurred twice. I don't remember the exact
2 dates. But it was probably 2011 or '12.

3 Q And sir, would you describe the total plant as
4 cleaner or less clean than it was when Mr. Peacock was
5 on site?

6 A Much cleaner.

7 Q And have you done anything to make the processes
8 more -- clean is the wrong word -- aseptic? Am I using
9 that correctly? Less contaminated.

10 A Yes.

11 Q What have you done?

12 A Well, phasing out the wet-batch process has been a
13 large help. Fermentation where we are achieving much
14 higher yields now by getting up to proper sterilization
15 temperatures. We have different procedures in place for
16 safeguarding the different materials, more quality
17 control checks, things like that.

18 Q Sir, currently are all products tested before
19 they're shipped?

20 A Yes.

21 Q And if they don't pass spec, do they ship?

22 A No.

23 Q Have manual counts replaced the ProtoCOL counting
24 device?

25 A Yes.

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1 Q And sir, the certificates of analysis, is it your
2 understanding that Ms. Walters in quality control is now
3 preparing those documents?

4 MR. BIANCHI: Objection. Leading.

5 THE COURT: Sustained.

6 BY MS. GEHRIG:

7 Q Do you know who was preparing those documents while
8 Malcolm was supervising people at the plant?

9 A The office, I believe.

10 Q And do you know who's preparing them now?

11 A Mindy Walters and the lab.

12 MS. GEHRIG: Thank you, sir. Those are all the
13 questions I have for you at this time. (1:45 p.m.)

14 THE COURT: Cross-examination.

15 CROSS-EXAMINATION

16 BY MR. BIANCHI:

17 Q Mr. Loverich, earlier you testified about a
18 conversation that you were having with Neil Seeger and I
19 think a Chris Pavain; is that right?

20 A Yes.

21 Q And you said you were talking about production --

22 A I believe so.

23 Q -- is that right? Do you remember that today?

24 A I don't remember the exact conversation. We were
25 in the plant, so I assume we were talking about

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1 production.

2 Q So do you know what you were talking about or --
3 with Chris Pavain?

4 A The exact -- I don't remember.

5 Q So you don't actually remember what you were
6 talking about with Neil and Chris Pavain; correct?

7 A That is correct.

8 Q The products that are made at Bio-Systems, the vast
9 majority, where do they end up?

10 A Wastewater treatment.

11 Q In an attempt to clean that; is that right?

12 A That's correct.

13 Q And correct me if I'm wrong, but you mentioned at
14 one point that you did not talk with sales when Malcolm
15 was running Bio-Systems; is that right?

16 A There was some interaction with sales, not nearly
17 as much as later.

18 Q But there was. You spoke with Dana Juul; right?

19 A Yes.

20 Q And you said that you provided a memo to Betco at
21 one point letting them know of various concerns that you
22 had?

23 A That's correct.

24 Q When was that?

25 A I believe 2011.

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1 Q Do you know when? A month?

2 A I think March.

3 Q March?

4 A March/April, somewhere in that time frame.

5 Q And then again, you talked to them when they came
6 to the plant in March; is that right?

7 A That's correct.

8 Q And you exchanged emails with Kurt at various
9 times; is that right?

10 A That's correct.

11 Q And with Denise Lennard, you exchanged emails with
12 her as well?

13 A That's correct.

14 Q And do you know Chris Pavain? What area did he
15 work in in Bio-Systems, do you know?

16 A I believe mainly sales.

17 Q Mainly sales. And at that time, your interaction
18 with sales was very minimal when you were talking with
19 Mr. Pavain; right?

20 A Reasonably, yeah. Yes.

21 Q And that was in September of 2011, that
22 conversation between you, Neil, and Chris Pavain?

23 A I don't remember the exact -- it sounds about
24 right.

25 Q Okay. And just to make sure I'm remembering, you
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1 and Neil are production people and Chris Pavain is
2 sales; right?

3 A That's -- he was over the overall operation, I
4 believe, but mainly sales.

5 Q So in September 2011, Chris Pavain was --

6 A He eventually -- excuse me. He eventually became
7 over more of it. Early on he phased in, I believe.

8 THE COURT: What you want to do is just let him
9 finish his question before you answer. I haven't been
10 very good about that today, so if you'd just let him
11 finish his question and you can answer. Go ahead.

12 BY MR. BIANCHI:

13 Q So Chris Pavain, when you had the conversation with
14 him and Neil, he was in charge of all of Bio-Systems?

15 A No.

16 Q Are you aware of customer complaints about
17 Bio-Systems' products in the time frame when Mr. Peacock
18 owned the company?

19 A Yes.

20 Q And how many products did Bio-Systems produce since
21 you've been there, like different kinds?

22 A Hundreds.

23 Q And I believe you discussed a product going out
24 that was under spec, but you don't know what that
25 product was?

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1 A There were multiple products. I'm sorry. What
2 time frame are we talking?

3 Q Sure. You had mentioned that products were being
4 sent out even though they were below spec and I'm asking
5 you if you can give me a specific product on when that
6 happened, a date and a specific product, please.

7 A If I could look at the records I could. B.O.D.
8 frequently went out. There was an SK3 for Brazil in
9 particular that did not meet specification; not only in
10 the final plate, but even the theoretical or the
11 intermediate used to make that up. That would have been
12 about every shipment. Liquid products were frequent.
13 And I don't even know about the solid products because
14 they weren't plated.

15 THE COURT: I'm sorry, they weren't?

16 THE WITNESS: Weren't plated.

17 THE COURT: Meaning they weren't given a
18 specific spec? What do you mean by that?

19 THE WITNESS: There was a specification.

20 THE COURT: They weren't tested.

21 THE WITNESS: Correct.

22 THE COURT: Okay. There was testimony earlier
23 that not all of the product even included a spec on it.
24 To your understanding was that true?

25 THE WITNESS: I believe most everything had a
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1 specification, but not a final test --

2 THE COURT: All right.

3 THE WITNESS: -- to see if it hit that.

4 THE COURT: Let me just ask this question
5 because in reviewing the videotape over the lunch hour,
6 I had forgotten that there were large boxes, almost like
7 you'd see with doughnuts, with sand on it that were in
8 trays. Was that the solid product?

9 THE WITNESS: Yes. That was the solid state
10 fermentation. It was the intermediate product that we
11 were growing up the bacterial on a solid state.

12 THE COURT: But is that how it was dried, just
13 by leaving it on those large carton containers?

14 THE WITNESS: That was part of the process.
15 They were put into a room that was temperature
16 controlled. It was essentially incubated for a period
17 of time to help the bacteria grow.

18 THE COURT: All right. So when you were
19 showing it on your film, that was the end stage?

20 THE WITNESS: Where they were at, yes.

21 THE COURT: Okay. And the powder product I
22 think it was called was in much smaller plastic sealed
23 bags? It was coming off a machine in a plastic seal,
24 almost like you'd see from the detergent products you
25 just put in your dishwasher.

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1 THE WITNESS: Yes.

2 THE COURT: The plastic would dissolve. That's
3 unrelated to that sand material we saw.

4 THE WITNESS: That very material was giving the
5 bacterial count for the pouched product that you were
6 seeing. So...

7 THE COURT: So in other words, was that -- the
8 large box was the medium for which the culture was then
9 developed?

10 THE WITNESS: Yes.

11 THE COURT: And that occurred in a separate
12 room under specific temperature ProtoCOLs.

13 THE WITNESS: Yes.

14 THE COURT: You may continue.

15 BY MR. BIANCHI:

16 Q After Betco's purchase of Bio-Systems, you
17 interacted with various Betco employees; correct?

18 A Correct.

19 Q And more specifically, you would talk with Brett
20 Hanus and Kurt Bischoff about the concerns that you had
21 about Bio-Systems' operations; right?

22 A Correct.

23 Q So during the first year after Betco purchased
24 Bio-Systems, at most there was maybe a couple of weeks
25 that you didn't speak with some Betco personnel; isn't
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1 that right?

2 A That could be right.

3 Q And during at least the early part of 2011, you had
4 limited interactions with Denise Lennard as well; right?

5 A That's correct.

6 Q And after the purchase and throughout all of 2011,
7 it was you who was responsible for sending out
8 production reports to Bio-Systems' employees and to
9 Denise Lennard; right?

10 A And to Mr. Peacock. I was generating the
11 production reports, that's correct.

12 Q And all the information in the production reports
13 is true?

14 A As far as I know, yes.

15 Q I'm going to show you Exhibit 842. If you look at
16 that little screen. So this is an example of one of
17 your kind of production reports sent out in July of
18 2011; is that right?

19 A Yes.

20 MR. BIANCHI: I would move Exhibit 842 into
21 evidence.

22 THE COURT: It is admitted.

23 BY MR. BIANCHI:

24 Q I plan on going through a couple of these. This is
25 going to be 843. This is another example. There's a
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1 little bit more information on this one. Do you
2 recognize that, Mr. Loverich?

3 A Yes.

4 Q And so was it just about every week that you would
5 send out one of these; is that right?

6 A That's correct.

7 MR. BIANCHI: Move Exhibit 843 in.

8 THE COURT: It is admitted.

9 BY MR. BIANCHI:

10 Q Do you know why these were sent to Denise Lennard?

11 A Because I thought she wanted to see them.

12 Q Did someone tell you that she wanted to see them?

13 A I don't recall if someone did or not.

14 Q Did Malcolm ever tell you not to sent the
15 production reports to Denise?

16 A Specifically on the production reports I don't
17 believe so.

18 Q Have you look at Exhibit 844. It's another one.
19 This one is sent in July; is that right?

20 A Yes.

21 THE COURT: Are 842 and 843, one of them is
22 mislabeled as to date. They both say 7-20-11.

23 MR. BIANCHI: I think they might be -- sent out
24 one with some of the information and then sent out one
25 shortly after with additional information is what it
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1 looks like potentially.

2 THE COURT: All right. I'll allow it.

3 BY MR. BIANCHI:

4 Q I'm going to show you Exhibit 846, Mr. Loverich.

5 Can you confirm that this one is an August 17th
6 production report that you sent out; is that right?

7 A Yes.

8 Q And this one I think also has with it Number 847,
9 which is a summary. Do you see that there?

10 A Yes.

11 Q You create those weekly production summaries?

12 A Yes. All of those previous emails would have had
13 this as well.

14 Q They would have had these attached to them
15 somewhere?

16 A That's correct.

17 Q How would you fill out one of these?

18 A All of the stations had logbooks that they kept
19 track of their production numbers. I would sum them all
20 up and enter them into this sheet.

21 MR. BIANCHI: Ask to move 846 and 847 into
22 evidence.

23 THE COURT: They are admitted, along with 844.

24 MR. BIANCHI: Yes. Thank you.

25 THE COURT: Since we're pausing, Ms. Gehrig, I
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1 assume you wanted Exhibit 8 to be admitted as well.

2 MS. GEHRIG: Thank you, Your Honor.

3 THE COURT: That is admitted.

4 BY MR. BIANCHI:

5 Q Mr. Peacock never told you to lie to anybody, did
6 he?

7 A No.

8 Q And some time after Betco purchased Bio-Systems,
9 Betco wanted to purchase pucks, which in turn meant that
10 Bio-Systems had to make more pucks; right?

11 A That's correct.

12 Q I think you already said this, but just to make
13 sure, producing more pucks would require additional
14 steam from your boilers; right?

15 A That's correct.

16 Q And we've seen this exhibit before, but we're just
17 going to show it to you. This is Exhibit 526 and this
18 is the notes from the visit in March of 2011 and it says
19 that "Joe and Brett reviewed the following operational
20 issues with Derek and Neil."

21 Do you see that there?

22 A Yes.

23 Q So you guys discussed, looks like the boilers, the
24 150-gallon fermenters, dust control; is that right?

25 A Yes.

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1 Q And then there was this Jack Holtz from Donaldson
2 Filtration Solutions. Were you involved with that?

3 A Yes.

4 Q And then if you look at number 5, you guys
5 discussed a long-term opportunity to eliminate the
6 wet-batch process.

7 A Yes.

8 Q Is that your idea?

9 A Mine as well as Neil's.

10 Q So back in 2011 after you had been using the
11 wet-batch process for a little over a year,
12 year-and-a-half, you were ready to eliminate it; is that
13 right?

14 A That's correct.

15 Q And were you in the court today when the gentleman
16 from LexaMed testified?

17 A No.

18 Q You were not? Have you seen his reports?

19 A Yes.

20 Q Are you aware that he said that the wet-batch
21 process can be used to grow spores?

22 A Yes.

23 Q And yet you and Neil were unable to get the
24 wet-batch process to work; is that right?

25 A It works to an extent. To get the yields that we
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1 need consistently for the products to go out to the
2 specifications, no.

3 Q And then if we look here, sorry, at number 7, it
4 says that there's "ongoing production challenges. We've
5 got the colony counts are consistently too low due to
6 inadequate fermentation equipment capability."

7 Is that something that you shared?

8 A Yes.

9 Q And then on the back, number 1 says "Have Derek and
10 Neil work with Joe to put together a proposal for new
11 boilers."

12 Did you and Neil work with Joe to put together a
13 proposal?

14 A Joe and Mr. Peacock.

15 Q And Number 3, "Start a project with the lab to
16 determine the viability of eliminating the wet-batch
17 process."

18 Were you involved with that at all?

19 A To a lesser extent. That would have been mainly
20 Mindy and Neil.

21 Q And do you remember, did -- it says there's a
22 tentative visit. Do you recall if Betco made that
23 tentative April 18th visit?

24 A I don't remember one way or another.

25 Q And so you presented Betco with a fair amount of
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1 your concerns in March of 2011; isn't that right?

2 A That's correct.

3 Q And yet they didn't take action for almost another
4 year; is that correct?

5 A That wasn't my understanding.

6 Q I'll have you look at Exhibit No. 710. Can you
7 confirm that it's an email that you sent to Kurt
8 Bischoff and also you cc'd Malcolm on; is that right?

9 A Yes.

10 Q And this is in August of 2011?

11 A Yes.

12 Q And so you were providing plate count information
13 to Mr. Bischoff about a Betco product; is that right?

14 A That's correct.

15 Q And the way that these products were plate counted,
16 would that have been using the spiral plater and the
17 ProtoCOL counter?

18 A Yes.

19 Q And you thought at this time, so August 2011, that
20 those plate counts were valid; is that right?

21 A That was our main process that we used, yes.

22 Q Is it true that you believe that the trigger for
23 sporulation through the wet-batch process in the manner
24 that was used by Bio-Systems was a nutrient running out
25 and dropping moisture levels; is that right?

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1 A Most likely.

2 Q And isn't it true that sometimes the wet-batch
3 process would work and provide sufficient counts high
4 enough in bacteria when counted with the spiral plater
5 and the ProtoCOL counter?

6 A Yes.

7 MR. BIANCHI: Ask to move Exhibit 710 into
8 evidence.

9 THE COURT: It is admitted.

10 BY MR. BIANCHI:

11 Q When you were in production and Mr. Peacock owned
12 Bio-Systems, you generally did not know what was talked
13 about with customers; isn't that right?

14 A Yes.

15 Q And with regards to the ProtoCOL counter, you don't
16 know if anyone at Bio-Systems had calibrated it before
17 Betco purchased them; is that right?

18 A I can remember Mr. Richard Peacock at one point
19 trying to, but I was only at arm's length from that, so
20 I don't remember the exact. But occasionally
21 Mr. Richard Peacock would work on it.

22 Q And did you understand that when Betco purchased
23 Bio-Systems that Richard still worked for Bio-Systems?

24 A Yes, for a certain number of hours per week.

25 Q So he was still available to work with you if you
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1 need it; is that right?

2 A I don't know if I felt that was the case. He
3 occasionally came in a couple times a month.

4 Q And you had noted earlier that you felt like he was
5 sort of an ally of yours; is that right?

6 A At times, yes.

7 Q But after Betco purchased the company, you didn't
8 consider him an ally any longer?

9 A Mr. Richard Peacock didn't work very often at all
10 at the plant.

11 THE COURT: After it was sold.

12 THE WITNESS: Correct.

13 BY MR. BIANCHI:

14 Q I know you said you thought Mr. Richard Peacock
15 might have calculated it. So it is possible that the
16 ProtoCOL counter was being calibrated by Mr. Richard
17 Peacock; is that right?

18 A That is possible.

19 Q And you are aware that when Mr. Peacock owned
20 Bio-Systems, he had customers and distributors come in
21 to watch the plating and counting process at
22 Bio-Systems; correct?

23 A Yes.

24 Q And indeed the spiral plater and the ProtoCOL
25 counter were described as new technology that

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1 Bio-Systems was proud of; right?

2 A Yes.

3 Q And you don't recall ever having a specific
4 conversation with Mr. Peacock about concerns you had
5 regarding the ProtoCOL counter being used to count
6 bacteria; isn't that right?

7 A That sounds correct.

8 Q And you didn't realize that manual counting of
9 bacteria was correct, in your mind, as opposed to using
10 the ProtoCOL counter until some time after Neil Seeger
11 began working at Bio-Systems; isn't that right?

12 A That's correct.

13 Q And you believe that Neil had more experience with
14 plate counting; is that right?

15 A That's correct.

16 Q Did you ever have conversations with Neil about him
17 being reprimanded at his previous job?

18 MS. GEHRIG: Objection. Relevance.

19 MR. BIANCHI: For failing to properly plate
20 count.

21 THE COURT: I'll sustain the objection. Next
22 question, Counsel.

23 BY MR. BIANCHI:

24 Q We already looked at this exhibit. Go back to
25 Exhibit 538. Recognize that? The 500-gallon fermenter
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1 procedure.

2 A Yes.

3 Q And it shows on 10-26-2011 you changed the
4 procedure completely. Do you see that?

5 A Yes.

6 Q Changed approved by. Here it's production manager?

7 A That's correct.

8 Q And you were the production manager at that time?

9 A That's correct.

10 Q And you do not remember if you ever spoke with
11 Mr. Peacock about salespeople filling out certificates
12 of analysis without checking with the lab first about
13 plate counts; isn't that right?

14 A I believe Mindy and I had asked about it. The
15 procedure had changed from time to time is what I
16 understand. I do know that Mindy had concerns several
17 times.

18 Q I'm asking you --

19 A If I --

20 Q -- if you -- isn't it right that you don't remember
21 if you ever spoke specifically with Mr. Peacock about
22 salespeople filling out certificates of analysis without
23 checking with the lab about what the plate counts were?

24 A That's probably correct.

25 Q During the year between March 2011 and March 2012,
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1 you continued trying to tell Betco about the concerns
2 you had about Bio-Systems, but from your perspective
3 they just didn't seem to understand; isn't that right?

4 A Yes.

5 Q And after Betco purchased Bio-Systems, it began
6 introducing new sales processes that created additional
7 changes in production; isn't that right?

8 A Yes.

9 Q And in fact, in 2012 Betco really started to ramp
10 up the changes which created a domino effect of even
11 more changes happening in production; isn't that right?

12 A Yes.

13 Q When Betco was providing the standard operating
14 procedures or SOP governing the wet-batch process to
15 LexaMed, the procedures did not follow exactly what the
16 written SOP said; wasn't that right?

17 A I don't know. I believe Neil Seeger was giving
18 those to them at that time.

19 Q So were you aware of, you know, in the April 2012
20 time period, whether the written procedures that
21 Bio-Systems had matched how it was actually engaging in
22 the wet-batch process?

23 A They should have.

24 Q They should have?

25 A Um-hmm.

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1 Q I'll have you look at Exhibit 727. It's an email,
2 May 2nd, 2012, from you to Kurt Bischoff. Do you recall
3 that email with Mr. Bischoff?

4 A I don't. I'm trying to familiarize myself.

5 Q Sure. I can move the document if you want me to
6 move it up. Turn to the next page.

7 A Sure. Down just a little bit, please.

8 Q This way?

9 A The other way. Right there. Okay.

10 Q So apparently there was some discrepancy between
11 the written process and what was actually being
12 practiced; isn't that right?

13 A That looks to be the case.

14 Q And you were the production manager during that
15 time, weren't you?

16 A Yes.

17 Q And so any differences between the written and the
18 actual process, you would have been a part of putting
19 that in the standard operating procedures or in the ISO
20 Manual; isn't that right?

21 A That should have been the case.

22 MR. BIANCHI: Move to admit Exhibit 727.

23 THE COURT: It is admitted.

24 BY MR. BIANCHI:

25 Q You are unaware whether Mr. Peacock concealed
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1 bacteria counts below specification from Betco; correct?

2 A Correct. I don't know what they were talking
3 about.

4 Q The one meeting that you recall at which
5 Mr. Peacock allegedly told you and other Bio-Systems'
6 employees not to speak to Denise Lennard was after the
7 March 2011 visit when you had shared in detail your
8 concerns with Betco, wasn't it?

9 A Yes.

10 MR. BIANCHI: I have no further questions.

11 THE COURT: Redirect. (2:16 p.m.)

12 MS. GEHRIG: Thank you, Your Honor.

13 REDIRECT EXAMINATION

14 BY MS. GEHRIG:

15 Q Mr. Loverich, I want to direct your attention to
16 something you were just looking at, that was Exhibit
17 727, an email exchange with you and Mr. Bischoff. I
18 don't have it to pull up, but do you remember you just
19 reviewed that?

20 A Yes, it was actually --

21 MR. BIANCHI: I've got it.

22 MS. GEHRIG: Oh. Thank you.

23 BY MS. GEHRIG:

24 Q We're all looking at the same thing now,
25 Mr. Loverich?

DEREK LOVERICH - REDIRECT

1 A Yes.

2 Q Okay. Sir, did you think that any deviation that
3 was described in this email was going to have a
4 significant effect on the overall process?

5 A No.

6 Q And what were your words to that effect?

7 A This was something that had previously been decided
8 with Mr. Peacock and that was one of the reasons I was
9 unaware of it. The fact that it didn't get into the ISO
10 Manual was partly because I was unaware of it.

11 Q And sir, the question that I'm asking is whether
12 you thought this was going to have a major effect on the
13 overall process or not, and I'd refer you to the second
14 paragraph in the middle of the page.

15 A I don't believe it would have had a large impact.

16 Q Just something that was overlooked?

17 A Correct.

18 Q Sir, I did want to go back a little bit to make
19 sure in response to some of the questions that the Court
20 was asking you about the processes in the Beloit plant,
21 just to make sure that everybody is on the same page.

22 Sir, in the video we see trays of product.

23 A Yes.

24 Q Is that wet-batch product?

25 A Yes.

DEREK LOVERICH - REDIRECT

1 Q So that is a powder product that is prepared
2 through the wet-batch process.

3 A Yes.

4 Q And sir, the large trays that I believe His Honor
5 described as kind of like doughnut trays, when you were
6 previously testifying about product being spread on the
7 floor, is that the product that was spread on the floor
8 for drying under Mr. Peacock's supervision?

9 A Yes.

10 THE COURT: I'm sorry, I'm confused then
11 because you had earlier indicated it was the medium in
12 which powder product was cultured.

13 THE WITNESS: Yes. It's very wet, and I can
14 describe it in detail if you'd like.

15 THE COURT: Well, so it wasn't product that was
16 spread out on the floor, it was a medium for the making
17 of product.

18 THE WITNESS: It was the bacterial wet-batch,
19 the intermediate product that makes up most of the final
20 product.

21 THE COURT: So was that -- what I've been
22 describing as the banker box with sand or the sandbox,
23 was that an intermediate product?

24 THE WITNESS: Yes.

25 THE COURT: Or was it medium?
DEREK LOVERICH - REDIRECT

1 THE WITNESS: It's intermediate product.

2 THE COURT: So it already was cultured.

3 THE WITNESS: Yes.

4 THE COURT: All right. How could there not be
5 contamination when that's your basic process?

6 THE WITNESS: That was one of the problems.
7 There would be contamination.

8 THE COURT: But anyone, including myself,
9 walking through that plant could see that.

10 THE WITNESS: That's correct.

11 THE COURT: Any other questions for this
12 witness?

13 MS. GEHRIG: I'll be as quick as I can, Your
14 Honor.

15 BY MS. GEHRIG:

16 Q Attorney Bianchi was asking you about material
17 under spec and you listed a couple of different
18 products. Sir, was this a daily occurrence that
19 products were being shipped under spec?

20 A Yes.

21 Q Sir, at the time period when Mr. Bischoff visited
22 the plant in March of 2011, had you abandoned all hope
23 of the wet-batch process?

24 A No.

25 Q At that point did you think that boilers would
DEREK LOVERICH - REDIRECT

1 help?

2 A Yes.

3 Q Sir, did you know the extent of the problem?

4 A No.

5 Q Did you know the extent of the ProtoCOL bias?

6 A No.

7 Q Did you know whether the finished product was
8 desired bacteria or not?

9 A No.

10 Q Did you know how to quantify how much the new
11 boilers would help or cure?

12 A No.

13 Q Sir, at the time you are looking at what's been
14 marked and admitted as Exhibit 538 from October of 2011,
15 and a comment that you had made that changed procedures
16 completely, was Mr. Peacock still in the plant at that
17 time?

18 A I believe so, yes.

19 Q Could you have changed procedures completely
20 without Mr. Peacock's approval at that time?

21 A No.

22 Q If anything did change procedures completely, would
23 his approval have been required?

24 A Yes.

25 MS. GEHRIG: Thank you, sir. That's all.
DEREK LOVERICH - REDIRECT

1 THE COURT: Thank you. You may step down.

2 (Witness excused at 2:23 p.m.)

3 THE COURT: Plaintiff may call its next
4 witness.

5 MS. GEHRIG: Thank you, Your Honor. Plaintiff
6 calls Ms. Mindy Walters.

7 **MINDY WALTERS, PLAINTIFF'S WITNESS, SWORN,**

8 THE COURT: You may proceed.

9 MS. GEHRIG: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MS. GEHRIG:

12 Q Ms. Walters, would you please state your full name
13 and spell your last name.

14 A Mindy Jean Walters. Walters is W-a-l-t-e-r-s.

15 Q Ma'am, where do you currently reside? Your
16 hometown.

17 A Brodhead.

18 Q Is that here in Wisconsin?

19 A Yes.

20 Q And Ma'am, are you employed at Bio-Systems in
21 Beloit?

22 A Yes.

23 Q When did you begin working at Bio-Systems?

24 A 1997.

25 Q And what was your formal education prior to
MINDY WALTERS - DIRECT

1 beginning work at Bio-Systems?

2 A I have an associate degree in food science.

3 Q Ma'am, what, if anything, did you learn about
4 bacteria and counting bacteria getting your food science
5 degree?

6 A We learned the manual count method.

7 Q And did you learn about different strains of
8 bacteria?

9 A We did, yes.

10 Q Did you learn about different strains of bacteria
11 under the microscope?

12 A Yes.

13 Q Is that something that you can see during the
14 manual counting process?

15 A Yes. On the Petri dish, yes.

16 Q Ma'am, what was your first job after graduation?

17 A I worked at Swiss Colony.

18 Q What was your title?

19 A I was a QA tech.

20 Q Beg your pardon?

21 A QA tech. Lab tech.

22 Q Is that quality assurance?

23 A That's correct, yes.

24 Q What did your duties include?

25 A We did plate counts and we tested product for
MINDY WALTERS - DIRECT

1 pathogenic bacteria.

2 Q So basically you're looking for the bad bugs?

3 A Correct.

4 Q And Ma'am, what testing procedures did you use at
5 Swiss Colony?

6 A We used the manual method.

7 Q How long did you work in that position?

8 A I worked there about a year-and-a-half.

9 Q And Ma'am, did you start work at Bio-Systems
10 immediately after your work at Swiss Colony?

11 A Yes.

12 Q And what position were you hired to fill?

13 A Lab manager.

14 Q Ma'am, who interviewed you for that position?

15 A Mr. Malcolm Peacock and Susie Ball.

16 Q Susie?

17 A Ball.

18 Q What was Susie's position in the company?

19 A I believe she was office manager at that point.

20 Q Ma'am, who supervised your work?

21 A Mr. Peacock did and also Teresa Linquester.

22 Q Who was -- excuse me. What position did
23 Ms. Linquester fill?

24 A She was a lab technician.

25 Q As a tech, did you ultimately supervise her?
MINDY WALTERS - DIRECT

1 A Yes.

2 Q Did you supervise everybody in the lab?

3 A Yes.

4 Q And Ma'am, did you have a staff of assistants over
5 the years?

6 A Yes.

7 Q What were your job duties when you began in that
8 position?

9 A We would plate the bacteria and count it.

10 Q Did you do any other type of QC testing?

11 A Yeah, we did moistures and we did some chemical
12 pHs, that kind of thing, and we did QC final checks.

13 Q Ma'am, when you refer to the final check, at what
14 stage is the product?

15 A Final. Ready to go out the door.

16 Q Ma'am, did you perform tests on liquid products?

17 A Yes.

18 Q On solid products?

19 A Yes.

20 Q And on powders?

21 A Yes.

22 Q Your lab -- was your lab responsible for QC on all
23 of those?

24 A Yes.

25 Q And Ma'am, you're responsible with regard for data
MINDY WALTERS - DIRECT

1 that comes from the lab. Do you have responsibility to
2 make sure that it's gathered consistently?

3 A Yes.

4 Q And do you have responsibility for making sure that
5 test data is recorded?

6 A Yes.

7 Q Is test data kept in the normal course of
8 Bio-Systems' business?

9 A Yes.

10 Q In terms of the timing of when the test data is
11 recorded, is it recorded soon after it's obtained?

12 A Yes.

13 Q Within hours? Days?

14 A Yes. Within hours, yes.

15 Q And Ma'am, I'm going to show you some pages from
16 what I'll represent is from Exhibit 27 and I'm going to
17 ask you if you can identify what these pages look like.
18 Do you see a series of pages going by you on the screen?

19 A I do, yes.

20 Q And Ma'am, what do these look like?

21 A Those look like our mix sheets.

22 Q And I'll represent what's being shown is Bate
23 stamped Toledo 1 through 25. Ma'am, what, if anything,
24 else do you see with the mix sheets?

25 A There's also test results as well.

MINDY WALTERS - DIRECT

1 Q How are these records kept? Are they kept together
2 or apart?

3 A They're kept together.

4 Q So if we're paging through this, through these
5 documents, what are we seeing?

6 A You would be seeing the mix sheet, and if
7 available, the test results.

8 Q Do these represent the business records that stored
9 data for Bio-Systems regarding your work?

10 A Yes.

11 Q Ma'am, is some of the stuff handwritten?

12 A Yes.

13 Q Whose handwriting would appear on these sheets?

14 A That one looks like it could be Derek's.

15 Q So you have some information from production that
16 comes into this?

17 A That's correct.

18 Q Could you describe what comes from production and
19 what's generated by your lab?

20 A What sheet?

21 Q Yeah. Basically what type of information.

22 A Basically what -- this would be generated by
23 production. This is kind of like their recipe, their
24 mix sheet. We would attach our test results to this
25 particular sheet.

MINDY WALTERS - DIRECT

1 Q So Ma'am, now we're looking at a page that looks
2 like it was computer generated. What is this?

3 A Yes. That would be a test result from the ProtoCOL
4 counter.

5 Q Now Ma'am, back in 2007 until after the business
6 was sold, was the ProtoCOL counter the device that was
7 used to bacteria test count?

8 A Yes.

9 Q Ma'am, did you maintain records in this same format
10 after the acquisition?

11 A Yes.

12 Q So basically the same type of data is coming from
13 production?

14 A Yes.

15 Q And that data from production is stored along with
16 the test records?

17 A Correct.

18 Q Now Ma'am, were you, in connection with this, did
19 you produce basically 100,000 documents in various forms
20 showing test data results dating back to 2007?

21 MR. BIANCHI: Objection. Leading.

22 THE COURT: It's preliminary. You can answer
23 the question.

24 THE WITNESS: Yes.

25 BY MS. GEHRIG:

MINDY WALTERS - DIRECT

1 Q And Ma'am, is that for one type of product or all
2 the products that were tested over that time period?

3 A All the different products.

4 Q And Ma'am, on these -- in these \$100,000 -- not
5 \$100,000 -- in these 100,000 documents, does it tell you
6 what type of tests that you performed?

7 A You mean spiral versus manual?

8 Q Does it tell you that?

9 A You could look at the sheet and know that that's a
10 spiral test result.

11 Q And does it tell you at what stage the test was
12 performed?

13 A Yes. If you look at the side, it will tell you
14 like, for example, that's a filter cake, so that would
15 be an intermediate.

16 Q Does it also tell you what the result of the test
17 was?

18 A Yes.

19 Q And I apologize if I already asked this, but does
20 it tell you what type of product in terms of liquid,
21 powder or solid was tested?

22 A Yes. In a way, yes.

23 Q If you know about the products, you can tell that.

24 A That's correct.

25 Q And Ma'am, in preparation for this trial, did you
MINDY WALTERS - DIRECT

1 supervise a review of those records to pull certain
2 data?

3 A Yes.

4 Q And does that data include what product was tested
5 at what stage of production?

6 A Yes.

7 Q From 2007 to present?

8 A Correct.

9 Q And Ma'am, do you see a chart in front of you?

10 A I do.

11 Q Does this chart compile that data from the 100,000
12 or more documents?

13 A Yes.

14 Q In May of 2015, did you participate in creation of
15 a video for use in this lawsuit?

16 A Yes.

17 Q Was your portion of the video created in your work
18 environment?

19 A Yes.

20 Q And Ma'am, did you explain some of your bacterial
21 testing procedures?

22 A Yes.

23 Q Did you explain what a manual count is?

24 A Yes.

25 Q And did you explain a count using the spiral plate
MINDY WALTERS - DIRECT

1 and ProtoCOL counter?

2 A Yes.

3 MS. GEHRIG: Your Honor, at this time I would
4 move into evidence the other portion of the video which
5 you have not seen.

6 THE COURT: The objection to that portion was
7 what, Counsel?

8 MR. BIANCHI: The objection is the process. As
9 long as there's a possibility of showing it and being
10 able to ask her questions about what she's doing, then I
11 don't have as much of a problem with it.

12 THE COURT: Well, the original objection was
13 hearsay. If I remember correctly, you had a problem
14 with its being shown. Which exhibit is it? It's
15 something A.

16 MS. GEHRIG: 45B, I believe.

17 MR. BIANCHI: Right. It was hearsay and then
18 it was delayed production to be able to watch the
19 process and ask questions about what was being done. So
20 it was two-fold.

21 THE COURT: What I told you at the Final
22 Pretrial Conference is that you can play it and you can
23 ask this witness to describe it as you play it. So if
24 you want to proceed to do that, then fine.

25 MS. GEHRIG: Thank you very much.
MINDY WALTERS - DIRECT

1 THE COURT: With apologies, you'll have to take
2 the volume down. With the size of some of these files,
3 I'm surprised the computer can open anything at this
4 point.

5 MS. GEHRIG: Your Honor, I don't want to waste
6 this Court's time. If you would prefer to watch it on
7 your own as you have the other --

8 THE COURT: Why don't you see. If you're able
9 to cue it up, we'll play it. But in the meantime if you
10 want to continue to ask questions, I would appreciate
11 it.

12 MS. GEHRIG: Thank you, Your Honor.

13 BY MS. GEHRIG:

14 Q Ma'am, the video that we're going to see, does it
15 show two different types of testing procedures?

16 A Yes.

17 Q And had you had any experience with the spiral
18 plater and ProtoCOL counter before Bio-Systems?

19 A No.

20 Q I'd like to distinguish between the manual plating
21 and the ProtoCOL counting. With manual plating, what --
22 tell us what you're doing -- what you're going to be
23 showing us in the video.

24 A Basically what we would be doing is we would be
25 hand placing the bacteria onto the Petri dish and

MINDY WALTERS - DIRECT

1 spreading it manually and then counting it with the
2 naked eye.

3 Q Okay. And Ma'am, do you have a series of dilutions
4 before you --

5 A That's correct, yes.

6 Q Ma'am, when you're -- and I hope this doesn't sound
7 like a stupid question. Are you actually seeing the
8 different colonies as you manually count them?

9 A Yes.

10 Q And can you at least in some circumstances
11 distinguish a contaminant from a desired bacteria?

12 A Yes.

13 Q If you manually count the same sample repeatedly,
14 do you expect to get the same result?

15 MR. BIANCHI: Objection. Leading.

16 THE COURT: Sustained.

17 BY MS. GEHRIG:

18 Q Ma'am, when you use the ProtoCOL counter, has it
19 been able to distinguish between strains of bacteria?

20 A Strains of bacteria? No.

21 Q Can it, to the best of your knowledge, distinguish
22 a contaminant from a desired bacteria?

23 A No.

24 MR. BIANCHI: Objection. Leading.

25 THE COURT: I'll overrule it.
MINDY WALTERS - DIRECT

1 BY MS. GEHRIG:

2 Q Ma'am, do you know whether the machine that you
3 were using in Bio-Systems was calibrated for any
4 particular strain of bacteria?

5 A No.

6 Q And Ma'am, was there -- are there occasions that
7 you can get a different plate count for the same sample
8 on the ProtoCOL counter?

9 A Yes.

10 Q How does that happen?

11 A It depends on the orientation where you place the
12 plate.

13 Q Could you describe that?

14 A Yes. There's an hourglass design on the pattern or
15 on the machine, and if you turn the plate, you can get a
16 different count.

17 Q Would you have that same experience with the manual
18 plate?

19 A No.

20 Q How much of a variation could you get with one
21 sample by twisting the plate?

22 A It could be quite a bit.

23 Q When you say *quite a bit*, what are we talking
24 about?

25 A Ten-fold. I'm not --
MINDY WALTERS - DIRECT

1 Q Ten-fold did you say?

2 A Yes.

3 Q And were you -- when you worked at Bio-Systems, did
4 you do anything to try to get maximum counts by twisting
5 the plate?

6 A We would turn it, yes, so it was in the hourglass
7 shape, yes.

8 Q Why did you do that?

9 A I thought that was what we were supposed to do to
10 get the highest counts.

11 Q Ma'am, did you have concerns about the accuracy of
12 test data produced by the ProtoCOL counter?

13 A Yes.

14 Q What was your concern?

15 A Just that they were a little bit higher than what a
16 manual count would be.

17 Q Did you discuss your concerns with anyone? Again,
18 now let's talk about time period. Before the company
19 was sold, did you talk to anybody?

20 A I did not, no.

21 Q After the company was sold, did you talk to
22 anybody?

23 A I did then. I talked to Derek and Neil.

24 Q And Ma'am, did you discuss your concerns with
25 Mr. Malcolm Peacock?

MINDY WALTERS - DIRECT

1 A About the counter?

2 Q Yeah.

3 A No.

4 Q Why not?

5 A I just didn't think that was something -- he was
6 the boss. I didn't talk to him about that.

7 Q Did Malcolm, Mr. Peacock, ever come to you with
8 questions about how quality could be -- quality control
9 could be improved?

10 A No.

11 THE COURT: You just need to speak a little
12 louder. Your answer was no?

13 THE WITNESS: Correct.

14 BY MS. GEHRIG:

15 Q Ma'am, when you were testing the products, if a
16 product comes to you to be tested, did you know the
17 specification, what it was supposed to test at?

18 A Yes.

19 Q And was that at all times before and after the sale
20 of the company?

21 A Yes.

22 Q And you understood that there were certain bacteria
23 counts that the specification would say should be in the
24 product?

25 A Yes.

MINDY WALTERS - DIRECT

1 Q And were you also aware that certain products
2 stated that they contained certain strains of bacteria?

3 A Yes.

4 Q And Ma'am, when the stuff came to you for final
5 shipment, did you see the bacterial counts and strains
6 of bacteria? Did you see those labels come through on
7 the final inspection?

8 MR. BIANCHI: Objection. Leading.

9 THE COURT: You can answer the question.

10 THE WITNESS: I'm sorry, can you repeat?

11 MS. GEHRIG: Sorry. It was a poorly phrased
12 question.

13 BY MS. GEHRIG

14 Q In the final inspection were the products labeled?

15 A Yes.

16 Q And did the labels frequently include a
17 specification?

18 A Yes.

19 Q Ma'am, were you aware back in 2007 to 2010 that
20 some products were sent out under C of A?

21 A Yes.

22 Q Certificate of analysis. And at that time did you
23 know which products had C of A?

24 A I did not know which products, no. I knew that
25 some internationals were, but I wasn't actually sure

MINDY WALTERS - DIRECT

1 what product.

2 Q Did you know some liquids had C of A?

3 A Yes.

4 Q Did you know that some powders had C of A?

5 A Yes.

6 Q And did you know that some solids had C of A?

7 A Yes.

8 Q Ma'am, back at that time, 2007 to 2010, did you
9 have any role in the preparation of the certificate of
10 analysis document?

11 A No.

12 Q Did you have any role in communicating test data to
13 people who were preparing them?

14 A No.

15 Q And was that the same situation after the
16 acquisition while Malcolm, Mr. Peacock, was in the plant
17 from September of 2010 to November of 2011?

18 A Yes.

19 THE COURT: Who did provide them if you did
20 not?

21 THE WITNESS: It would be in the office.

22 THE COURT: Someone in the office.

23 THE WITNESS: Correct. Um-hmm.

24 THE COURT: And did they get reports from you?

25 THE WITNESS: No.

MINDY WALTERS - DIRECT

1 THE COURT: So you didn't do any testing to
2 certify either.

3 THE WITNESS: We tested the product, yes.

4 THE COURT: But you do your typical test that
5 you would for spec.

6 THE WITNESS: Correct, yes.

7 THE COURT: And then that would be passed on.

8 THE WITNESS: No, I don't believe so.

9 THE COURT: So in your experience during the
10 period that we've just been talking about, before 2010
11 and then during the period when Malcolm Peacock was
12 still running the plant, were you aware that product was
13 shipping regularly that did not meet the spec?

14 THE WITNESS: Yes.

15 THE COURT: All right. And was that true for
16 all product lines?

17 THE WITNESS: Yes.

18 THE COURT: Thank you.

19 BY MS. GEHRIG:

20 Q Ma'am, going back, if you would, to Exhibit 16.

21 THE COURT: It should be on your screen now.

22 MS. GEHRIG: Perfect.

23 THE WITNESS: There's nothing on here.

24 THE COURT: Sorry. I can correct that too.

25 THE WITNESS: Thank you.
MINDY WALTERS - DIRECT

1 BY MS. GEHRIG:

2 Q Ma'am, does this chart reference the -- we
3 previously described the information that this chart
4 contains.

5 A Yes.

6 Q With reference to that chart as necessary, from
7 1997 to 2010 -- and when I say 2010 I mean up to the
8 sale of the business -- who directed what products were
9 tested at what different stages and times?

10 A Mr. Peacock did.

11 Q Did that continue until Mr. Peacock left the
12 business?

13 A Yes.

14 Q I want to talk about what tests were performed at
15 what times.

16 A Okay.

17 Q As of September of 2010 and ongoing until
18 Mr. Peacock left the business in November of 2011, how
19 were liquids tested?

20 A They were -- final product liquids?

21 Q Were they tested at all at any stage?

22 A Yes. At some point in time they were tested, yes.

23 Q At what stage were they tested?

24 A In the final product and intermediate.

25 Q When liquid products were tested?

MINDY WALTERS - DIRECT

1 A There was a point in time where we did not test
2 final products for liquids.

3 Q Let's start at the beginning. Liquid products
4 between September 2010 --

5 A Okay.

6 Q -- and until Mr. Peacock left the business, were
7 they tested in an intermediate phase?

8 A Yes.

9 Q Were they tested in a final phase?

10 A No.

11 Q What did you use for the count of the product?

12 A I believe it would have been the intermediate
13 product.

14 Q Had you ever heard the term *theoretical count*?

15 A I had not, no.

16 Q You've never heard of that?

17 A I've heard of it, yeah. But prior --

18 Q Where did you hear of it?

19 A Mr. Peacock.

20 Q And what did Mr. Peacock explain that a theoretical
21 count was?

22 A It's basically your -- it's a theory of account.
23 If you put the sums together, it should equal that.

24 Q And what data do you take?

25 A I'm sorry?

MINDY WALTERS - DIRECT

1 Q Is it from the intermediate product testing?

2 A Yes.

3 Q Okay. So describe to me how you understand by his
4 explanation you would come up with a theoretical count.

5 A What you would do is you would test the
6 intermediate product and then you would get the count of
7 that, and depending on how much of the percentage of the
8 intermediate product you use, that should technically be
9 your theoretical count.

10 Q And were -- you said that liquid products were not
11 tested in their final phase.

12 A Correct.

13 Q What was used in place of final phase testing?

14 A I believe it was the intermediate.

15 Q Did that cause you a concern?

16 A Yes.

17 Q Why?

18 A Just because bacteria is a live organism and stuff
19 can happen and they could die and the final product may
20 not contain the exact count.

21 Q Ma'am, was there a time historically when final
22 liquids were tested?

23 A Yes.

24 Q Did you participate in any conversations with
25 Mr. Peacock about not testing final product after a

MINDY WALTERS - DIRECT

1 certain time frame?

2 A If we didn't test them, I would have to -- he would
3 have told me not to test them, yes.

4 Q And did he give you any explanation of why final
5 liquids would not be tested or liquids would not be
6 tested in their final form?

7 A No. Not that I recall, no.

8 THE COURT: When did this happen? When did you
9 switch from counting the final product to just doing the
10 intermediate?

11 THE WITNESS: It was kind of back and forth.
12 We tested and then didn't test and then we tested again.
13 I believe it was 2012 again when we started testing
14 final products, liquids.

15 THE COURT: Had you -- when did you start?
16 When is the first time you remember not testing the
17 final product?

18 THE WITNESS: I believe it was 2010, I believe.
19 I'm not sure of the date.

20 THE COURT: Before or after the sale of the
21 company?

22 THE WITNESS: It would have been before the
23 sale of the company.

24 BY MS. GEHRIG:

25 Q And Ma'am, at any time if referring to the chart
MINDY WALTERS - DIRECT

1 would be helpful to you to answer questions, please let
2 us know.

3 A Okay.

4 Q Ma'am, directing your attention to powders, when we
5 talk about powders is the vast majority of those what we
6 refer to as wet-batch products?

7 A Yes.

8 Q And Ma'am, were -- at what stages were wet-batch
9 products tested?

10 A They were tested at the intermediate and the final
11 stage.

12 Q Were there times that the final tests were not
13 completed before the product shipped?

14 A Yes.

15 Q How frequently would that occur?

16 A On a daily.

17 Q Daily?

18 A Yes.

19 Q And Ma'am, with there times that the final test
20 revealed that the product did not pass bacteria counts
21 back on the ProtoCOL counter?

22 A Yes.

23 Q And can you approximate a percentage of time it
24 just didn't pass spec?

25 A I would say about 30 percent.

MINDY WALTERS - DIRECT

1 Q Did you tell Mr. Peacock?

2 A There was times that I would tell him that it would
3 -- yeah, it would fail.

4 Q And how would he respond?

5 A At that point is when he would say there wasn't
6 anybody testing the product at a particular time.

7 Q Did he take any action to fix the product?

8 A Not to my knowledge, no.

9 Q And did the product --

10 THE COURT: I'm sorry. What did you understand
11 that to mean when you said there wasn't anyone testing
12 the product at the time?

13 THE WITNESS: I just assumed that there would
14 be nobody double-checking the count, the final count.

15 THE COURT: I still don't understand. You
16 brought to his attention the fact that the counts were
17 not meeting the spec.

18 THE WITNESS: Um-hmm.

19 THE COURT: That's what I thought you had said.

20 THE WITNESS: That's correct, yes.

21 THE COURT: And he responded by saying the
22 testing wasn't done at that time.

23 THE WITNESS: Yeah. Our customers were not
24 testing their product, the product that they had gotten
25 from us.

MINDY WALTERS - DIRECT

1 THE COURT: So what did you understand him to
2 be saying? That as long as they didn't catch it, it
3 didn't matter?

4 THE WITNESS: Yes.

5 THE COURT: Or what did you understand?

6 THE WITNESS: That's what I understood it to
7 say.

8 THE COURT: All right. You may continue
9 questioning.

10 MS. GEHRIG: Thank you, Your Honor.

11 BY MS. GEHRIG:

12 Q And Ma'am, if the product came back and had failed
13 and had not yet shipped, did it ship anyway?

14 A Yes.

15 Q Ma'am, what are extruded solids?

16 A Extruded solids are our UR line.

17 Q I beg your pardon?

18 A Our UR line, our urinal pucks.

19 Q Urinal pucks.

20 A Urinal pucks, yes.

21 Q And Ma'am, did those contain specifications?

22 A Yes.

23 Q And were C of As issued for some of them?

24 A Yes.

25 Q Were extruded solid products tested at all?

MINDY WALTERS - DIRECT

1 A Not up until 2011 it looks like, the end of 2011.

2 Q After Mr. Peacock left the business?

3 A Yes.

4 Q And when I say after he left, that's after the year
5 that he stayed on site?

6 A Yes.

7 Q Prior to the acquisition, did you voice your
8 quality control concerns to anybody in the business?

9 A Prior to did you say?

10 THE COURT: Yes. Before the sale.

11 THE WITNESS: No.

12 BY MS. GEHRIG:

13 Q And Ma'am, did you believe that it would be
14 constructive to discuss them with Mr. Peacock?

15 A Yes.

16 Q Did you believe it would be constructive to discuss
17 them --

18 A No.

19 Q Okay. And Ma'am, we've all been talking about
20 Mr. Peacock leaving in November. How did you become
21 aware he wasn't going to be on site anymore?

22 A I had found out, and I'm not sure who told me. I
23 just found out he was no longer with the company.

24 Q Now Ma'am, did you discuss your concerns with --
25 who primarily did you discuss your quality control

MINDY WALTERS - DIRECT

1 concerns with after Mr. Peacock had left the business?

2 A Derek Loverich and Neil Seeger.

3 Q I think you'll see what has been admitted as
4 Exhibit 4 on the screen in front of you. Does that look
5 like something you've seen before?

6 A Yes.

7 Q And Ma'am, have you read it?

8 A Yes.

9 Q Does it appear to be an email from Mr. Loverich to
10 different people in the Betco organization and with you
11 cc'd on January 17th of 2012?

12 A Yes.

13 Q Did you participate in discussions with
14 Mr. Loverich before that went out?

15 A Yes.

16 Q Okay. And having --

17 THE COURT: Counsel, could I ask if you're
18 suddenly determined to show this tape, could you just --

19 MR. JACKSON: I'm sorry, Your Honor.

20 THE COURT: You're going to need to switch it
21 to a different computer, is that the problem? So can we
22 just complete this questioning on this exhibit rather
23 than all this rigmarole.

24 MR. JACKSON: I'm sorry, Judge.

25 THE COURT: Would you please continue, Counsel.
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1 It wasn't your fault. I mean when you're ready, we'll
2 do it.

3 MR. JACKSON: Okay. Thank you, Judge.

4 THE COURT: Please.

5 BY MS. GEHRIG:

6 Q Ma'am, is the information in that email accurate?

7 A Yes.

8 Q And I'd like to draw your attention to particular
9 areas that deal with your position in the company. Did
10 you contribute to information regarding products being
11 shipped before the plate results were in?

12 A Yes.

13 Q And final liquid products not being plated?

14 A Yes.

15 Q And the 30 percent of the products shipped not
16 meeting specification?

17 A Yes.

18 Q And now Ma'am, I want to talk about the certificate
19 of analysis. Did you know what the salespeople were
20 using for information at that time?

21 A No.

22 Q And Ma'am, again since we've gone through this
23 already with Mr. Loverich, I don't feel the need to go
24 through it in detail but confirm you have read this
25 information. It was accurate to the best of your

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1 understanding at that time?

2 A Yes.

3 Q If you could please pull up Exhibit 8.

4 THE COURT: Ms. Gehrig, whenever you want to
5 switch over and play the tape, it's up to you, whatever
6 is a natural point to do that.

7 MS. GEHRIG: Your Honor, thank you. I think if
8 we do this one last --

9 THE COURT: That's fine. I agree.

10 BY MS. GEHRIG:

11 Q Ma'am, have you viewed this document before?

12 A Yes.

13 Q And it's been admitted into evidence and I'll just
14 orient you, I'll represent that it's an email that was
15 sent out on May 16 of 2012, apparently from Mr. Seeger
16 to Mr. Bischoff?

17 A Yes.

18 Q And Ma'am, does this email go to the core of some
19 of what you had been doing in quality control?

20 A Yes.

21 Q Ma'am, you testified earlier about concerns.

22 A Um-hmm.

23 Q Is that a fair characteristic, of concerns about
24 the ProtoCOL counter?

25 A Yes.

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1 Q Before Mr. Seeger had done his testing that's
2 described in this email, did you know what the extent of
3 the problem might be?

4 A No.

5 Q Did Mr. Seeger's analysis confirm or discount your
6 concerns?

7 A It confirmed.

8 Q And once again, Ma'am, not to belabor the contents,
9 but were you familiar with the content of this email
10 before it went out through discussions with Mr. Seeger?

11 A Yes.

12 Q And is this information accurate or was it accurate
13 to the best of your understanding on May 16 of 2012?

14 A Yes, to the best of my understanding.

15 (Video played at 2:52 p.m.)

16 THE COURT: While you're waiting, is it just 16
17 that needs to be admitted?

18 MS. GEHRIG: Yes, Your Honor.

19 THE COURT: It is admitted. (Video started)
20 Ms. Walters, you should feel free to describe what it is
21 we're looking at.

22 THE WITNESS: What we're doing here is it looks
23 like we're getting ready to do a serial dilution. And I
24 am basically taking 1 mil out of a sample and placing it
25 into a 99 mils.

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1 THE COURT: In other words, a concentrated
2 sample that you're placing into a much larger liquid?

3 THE WITNESS: That's correct.

4 THE COURT: And is that liquid just water?

5 THE WITNESS: It's a buffered solution. And
6 then the serial dilution continues. Okay.

7 Now I'm taking a sample out of the last dilution
8 bottle and I am putting it onto the Petri dish. And it
9 would be in three -- it would be triplicate plates.

10 THE COURT: And the product you're testing
11 here, is this a liquid?

12 THE WITNESS: It is, yes. And then I would
13 spread it.

14 THE COURT: If it wasn't, it is now.

15 THE WITNESS: Right. Then I would take a
16 spreader and spread out the colonies. Okay.

17 Then we would put this in the incubator, and after
18 24 hours, we would manually count the product. And that
19 is a colony counter in my hand and Sharpie and you
20 literally just count each colony that you see.

21 THE COURT: How would you distinguish between
22 contaminated culture and the actual culture when trying
23 to count?

24 THE WITNESS: You can tell by a morphology of
25 the colony a little bit. You get to learn what the

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1 colonies look like of the purchased culture.

2 And then this is the ProtoCOL spiral plater and
3 that's a blue dye plate just to kind of get the visual
4 effect, otherwise you couldn't see anything. And it
5 basically is concentrated in the middle, more dilute as
6 it goes to the edges.

7 THE COURT: You're talking about the ink now.

8 THE WITNESS: Correct, correct. Yes. And that
9 would mimic the sample. And then that is placed in the
10 incubator for 24 and 48 hours.

11 And then after your 48 hour, that's what it would
12 look like. Then you would place it on the ProtoCOL
13 colony counter, you would enter in all your data that
14 you need, and basically you -- basically hit the space
15 bar and it would give you a count. And right there is
16 the count.

17 THE COURT: And once having been altered in
18 that way, would you still be able to do a hand count of
19 it? Or once it's gone through the spiral process, is it
20 not possible to hand count anymore?

21 THE WITNESS: It's plated a different way, so
22 it's --

23 THE COURT: You couldn't do apples to apples.

24 THE WITNESS: Correct.

25 MS. GEHRIG: Your Honor, would it be acceptable
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1 to ask that it be rewinded so you can see the last
2 portion, the plate where you were questioning the
3 witness? Or would you --

4 THE COURT: If what you're trying to show is
5 just the concentric circles --

6 MS. GEHRIG: I --

7 THE COURT: That's fine. Go ahead. You can
8 play it back just a hair. But we're not going to spend
9 a lot of time with it, if you're able to.

10 MS. GEHRIG: Would you prefer I just ask the
11 witness questions about what she identified?

12 THE COURT: I would be delighted.

13 BY MS. GEHRIG:

14 Q Ms. Walters, what was the last ten seconds of the
15 video that we did not see? Did you do anything to the
16 plate?

17 A Yes. There was a part in there where I showed if
18 you turn the plate, that you would get different
19 results.

20 Q And how different was the result in this case?

21 A I believe that is the results right there.

22 THE COURT: Can you tell by that what the
23 variation was?

24 THE WITNESS: I'm sorry?

25 THE COURT: Could you tell by that how great
MINDY WALTERS - DIRECT

1 the variation was?

2 THE WITNESS: Yes. Um-hmm.

3 THE COURT: What was it?

4 THE WITNESS: It was quite a bit. 1.33 times 7
5 to the 8th and 8.3 times 10 to the 9th or something like
6 that.

7 BY MS. GEHRIG:

8 Q Ma'am, did significant changes -- are we all done
9 with that? Did significant changes begin to occur to
10 the company in 2012?

11 A I'm sorry?

12 Q Did significant changes begin to occur in late
13 2012?

14 A Yes.

15 Q And Ma'am, did you personally bring the certificate
16 of analysis issue to the attention of the person who was
17 supervising you at that time?

18 A Yes, I did.

19 Q Mr. Keith Kennedy?

20 A Correct.

21 Q And has that process changed?

22 A No, we -- I'm sorry. Has --

23 Q Does -- you previously described to the Judge that
24 the sales staff would prepare certificates of analysis.

25 A Yes.

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1 Q Has the process changed?

2 A Yes. It is now the lab and QA having control of
3 the documents for C of A.

4 Q And Ma'am, do you prepare certificates of analysis
5 close in time to when the product is tested?

6 A Yes.

7 Q And are those stored in the normal course of
8 business at Bio-Systems?

9 A Yes.

10 Q Ma'am, does the document in front of you have
11 significance to you?

12 A Yes.

13 Q What is that?

14 A That is a certificate of analysis.

15 Q And if you could go top to bottom, starting with
16 the upper left-hand corner.

17 A Sure. Right there it will say approved by and it
18 will be the name of the person that has completed the
19 document. There will be the bill to, ship to. There's
20 also a lot number, which would be for the final product.
21 There is a manufacture date, which is the date that we
22 started -- we produced the test -- produced the product
23 and tested it on the shipment date, the date that it
24 went out the building. And then there would be the
25 analysis of the total count.

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1 Q And Ma'am, what does this particular certificate of
2 analysis, what does it certify?

3 A This is certifying this colony-forming units per
4 gram.

5 Q And Ma'am, is there any qualifying language in this
6 particular document?

7 A Yes. This is a potential product that we do not do
8 a final plate count out and we state that we do not do
9 it. It's to a predetermined bacterial count.

10 Q Basically if you don't do a test for a particular
11 reason, do you put that on the certificate?

12 A That's correct.

13 Q And if you could, to the second page, please.
14 Ma'am, is this another certificate of analysis?

15 A Yes.

16 Q And is this another one that bears your approved by
17 designation?

18 A Yes.

19 Q And again, if you could just walk us through.

20 A Sure. My name is up at the upper left-hand corner,
21 the lot number, the company who it's shipping to, the
22 PO, the manufactured date, shipment date, the product
23 name, and then the total count and the predetermined
24 again.

25 Q Okay. Ma'am, are you -- now do you test all final
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1 liquid product?

2 A Yes.

3 Q And do you test all solid products?

4 A Yes.

5 Q And do you continue to test any powder products?

6 A Yes.

7 Q Is everything tested before it's shipped?

8 A Yes.

9 Q If it doesn't meet spec, does it ship?

10 A No.

11 Q Ma'am, in 2013 did you participate in testing
12 analysis at the direction of Mr. Kennedy?

13 A Yes.

14 Q And did you perform analysis on wet-batch products?

15 A Yes.

16 Q Did you perform tests on -- at what stage of the
17 products were you testing them?

18 A I believe we did the intermediate products.

19 Q Did you also do final?

20 A Yes.

21 Q And Ma'am, what did the results of your test show?

22 A It showed that the final products were lower than
23 the intermediates.

24 Q And would the final products have been able to meet
25 a 5-billion spec?

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1 A No.

2 Q Ma'am, did you also do some testing for Mr. Kennedy
3 comparing spiral plate counts with manual plate counts?

4 A Yes.

5 Q And what kind of testing?

6 A It was a manual count versus spiral. We basically
7 did the same products side by side.

8 Q Did you do that for multiple strain products?
9 Liquids?

10 A Yes.

11 Q Solids and powders?

12 A Yes.

13 Q And did you also do some single strains for
14 comparison?

15 A I believe so, yes.

16 Q And Ma'am, what percentage of products produced in
17 the Beloit plant are multiple strain?

18 A Gosh, 95 percent of them, 90 percent of them.
19 Quite a few.

20 Q And has that been the case since you started
21 working for Bio-Systems?

22 A Yes.

23 Q Ma'am, with regard to additional changes, are you
24 aware of bacteria purchases increasing?

25 A Yes.

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1 Q And was that all of a sudden or has it been
2 gradual?

3 A Gradual.

4 Q Initially for which products?

5 A Powders.

6 Q And right now which products contain purchased
7 bacteria?

8 A Most every product.

9 Q And Ma'am, have you switched your counting
10 procedures?

11 A Yes.

12 Q Right now do you do any ProtoCOL counting?

13 A No.

14 Q Was this again a gradual switch or all of a sudden?

15 A Gradual.

16 Q When was it complete?

17 A I believe it was April of this year.

18 Q Do you believe bacteria -- do you believe that has
19 improved the accuracy of your testing?

20 A Yes.

21 MS. GEHRIG: Thank you, Ma'am. (3:05 p.m.)

22 THE COURT: Cross-examination.

23 CROSS-EXAMINATION

24 BY MR. BIANCHI:

25 Q Earlier in your testimony, Ms. Walters, you noted
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1 that at your previous job, Swiss Colony, you were
2 looking for bad bugs.

3 A Yes.

4 Q What did you mean by that?

5 A Pathogenic bugs.

6 Q Why? What was bad about them?

7 A It was a food -- it was a food product, so we
8 didn't want anything pathogenic in the product.

9 Q So in that process you did pour plate manual count?
10 Is that --

11 A We used a PG film is what we did. But it was a
12 manual, yes.

13 Q So the concern was you don't want bacteria in
14 there; right?

15 A That's correct.

16 Q And at Bio-Systems, you actually want bacteria;
17 right?

18 A That's correct.

19 Q And a lot of the data that we've been talking
20 about, all going back to 2007, where is all that kept?

21 A The actual final products?

22 Q The data on it.

23 A The data, it's electronic and it's a hard copy,
24 yes.

25 Q So electronically it would be -- there's a server
MINDY WALTERS - CROSS

1 computer?

2 A Yes.

3 Q Who has access to that computer?

4 A I believe quite a few people do, I'm not exactly
5 sure who all has access or not. I know the lab does.

6 Q Okay. Do you know whether salespeople have access
7 to it?

8 A That I'm not sure what they have access to.

9 Q So they could, you just don't know?

10 A Sure, correct.

11 Q And the information that you use for certificates
12 of analysis, it's located in that computer server
13 somewhere, isn't it?

14 A Yes.

15 Q So if someone had access to that computer server,
16 whether directly or remotely, they would be able to
17 access that information; right?

18 A Yes.

19 Q And when Betco purchased the company, you showed
20 Mr. Bischoff how you did counts; right?

21 A Yes.

22 Q So he was aware where all the information about the
23 counts was stored; correct?

24 A I believe so.

25 Q You showed him what you were doing; right?

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1 A Yes.

2 Q And that you entered the information in; is that
3 right?

4 A Yes.

5 Q And so he could have accessed that information in
6 the computer; is that right?

7 A Yes.

8 Q Did Malcolm tell you to hide the information in the
9 computer from anyone at Betco?

10 A No.

11 Q We were looking at this exhibit, I think it's 16;
12 is that right? Is that what this is? And I understand
13 that you looked at underlying data and you took this
14 information; is that right?

15 A Yes.

16 Q And so currently that looks like M-14 at the very
17 bottom, that's May 2014; is that right?

18 A Yes.

19 Q And that's when the spiral plate/ProtoCOL count
20 stopped; is that right?

21 A No. That's when we started to do a few products.
22 Mainly C of A products were done manually at that point.

23 Q That's the MS; right? Manual spreader, is that
24 what MS is?

25 A Correct. Correct.

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1 Q So, but you guys chose not to do MP; right?

2 A Right.

3 Q There's the test that LexaMed did on all the
4 products; right?

5 A I believe so.

6 Q Is there a reason why you guys have chosen not to
7 do manual pour plate counts?

8 A Why we chose not to do?

9 Q Correct.

10 A No. What that -- at that particular time the
11 company we were purchasing bacteria from suggested the
12 way to plate.

13 Q Have you checked to see if the way that they
14 suggested doing this manual spread plate gives you
15 different results than if you follow what LexaMed had
16 told you what they think is kind of the best method,
17 which is that pour plate manual count?

18 A No.

19 Q I think you mentioned Richard Peacock being
20 involved also with the lab --

21 A Yes.

22 Q -- is that correct?

23 A Yes.

24 Q Did he ever talk to you about when a product should
25 be plated?

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1 A No.

2 Q Was he involved with the technical -- any technical
3 issues with the ProtoCOL counter; is that right?

4 A Yes.

5 Q And when you started at Bio-Systems, there was no
6 ProtoCOL counter; is that right?

7 A That's correct.

8 Q And in fact, it was Richard Peacock who trained you
9 in the use of the counter; is that correct?

10 A Well, actually the day I was there to visit, the
11 sales tech was there for the ProtoCOL counter.

12 Q So it was your first day was the first day they
13 obtained that?

14 A Yes.

15 Q I'm going to bring you, because it's very big, the
16 Exhibit 790.

17 MR. BIANCHI: Your Honor, may I approach?

18 THE COURT: You may.

19 BY MR. BIANCHI:

20 Q Can you identify what that document is?

21 A That looks like the ProtoCOL Manual.

22 Q And is that -- do you recognize the writing on it
23 at all? It's not yours?

24 A No. Hmm-um.

25 Q And are you familiar with the ProtoCOL Counter
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1 Manual?

2 A Yes. What I've used of, yes.

3 Q Do you use it regularly?

4 A No longer.

5 Q When Bio-Systems was using the ProtoCOL counter,
6 were you using the manual?

7 A The manual?

8 Q Yes.

9 A No. We didn't have it every day by us, no.

10 Q If you ran into problems, did you use the manual?

11 A If we ran into problems, we usually got Richard.

12 Q In the video that we watched, there were some flags
13 that were listed in the ProtoCOL counter screens. Do
14 you know what flags are?

15 A Yes.

16 Q And what do they signal generally; are you aware?

17 A Some of them would be a re-read or if they are
18 lower.

19 Q What about the letters -- there were letters --

20 A Yes.

21 Q -- that were noted as flags; right?

22 A Yes.

23 Q So if you turn to 079356 of the document in front
24 of you -- sorry. There's -- they're called Bates
25 numbers in the lower right-hand corner.

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1 A I'm sorry, what was the number?

2 Q It is 079356.

3 A 356. Okay.

4 Q And so if there were the letters LSU, what would
5 that mean?

6 A That says account lower than the account limit and
7 I believe the S was the spread of the separator that was
8 used. That would be the mode. And then it was a whole
9 frame was used.

10 Q So what does that mean to you? What does it mean
11 that the count was lower than the count limit and
12 therefore the whole frame had to be used?

13 A That's correct.

14 Q What does that mean though?

15 A What that means to me is that it has -- it has -- I
16 guess I'm not sure what the interval is and if once it
17 gets past that, it would count it as a whole.

18 Q And so does that affect the reading --

19 A Yes.

20 Q -- that's happening?

21 A Yes.

22 Q And so if the other one said S2, what would that
23 mean?

24 A Separator was used and two sectors of the spiral
25 frame was used. So it wouldn't be a whole plate. It
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1 wouldn't be a total plate reading.

2 Q So that would give you different readings then;
3 right?

4 A I would assume, yes.

5 Q And then what would you do with that information?

6 A That information?

7 Q Correct. If you had, like it was on the screen,
8 one said LSU and one said S2, does that mean you rerun
9 the test? What's the next step there?

10 A No. That we just took the reading that it gave.

11 Q Is that what the manual says to do?

12 A No. I don't know.

13 Q And if you turn to 079362.

14 A Yes.

15 Q Look at that, and flip to the next page, there's
16 talk here about validation procedures.

17 A Okay.

18 Q Do you see that?

19 A Yes.

20 Q Do you use those procedures?

21 A No.

22 Q Why not?

23 A I'm not sure.

24 MR. BIANCHI: Your Honor, I'd ask that we move
25 into evidence Exhibit 790.

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1 THE COURT: It's admitted.

2 MR. BIANCHI: I'll bring you another thick one.

3 I'm sorry. Your Honor, may I approach?

4 THE COURT: You may.

5 BY MR. BIANCHI:

6 Q This is what's marked as Exhibit 778.

7 A Okay.

8 Q Feel free to take a look. And can you just confirm
9 it's Section 7 of the ISO Manual? And it looks like the
10 last update in this one was June 3rd, 2010; is that
11 right? If you look at this one, it's Bates PLT 040114.

12 A Yes. Okay.

13 Q You're familiar with the ISO Manual?

14 A I am.

15 Q And you're familiar with Section 7?

16 A Yes.

17 Q Where was the ISO Manual kept?

18 A It was in the lab.

19 Q And is that when Mr. Peacock owned the company?

20 A Yes.

21 Q I'm going to have you turn to page PLT 040130.

22 A Okay.

23 Q And so this talks about the procedure for doing
24 standard plate count; correct?

25 A Yes.

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1 Q And if you get down, you're making the plate, and
2 you have counting colonies.

3 A Yes.

4 Q What does it say underneath that?

5 A "See owner's manual."

6 Q See owner's manual. Did you often see the owner's
7 manual for your process of counting colonies?

8 A No.

9 Q How about the Spiral Plater Manual? Did you use
10 that?

11 A No.

12 Q But you believed that in your processes in the lab
13 that you were following the ISO requirements for the lab
14 in 2010; isn't that right?

15 A Yes.

16 Q And you also believed that you were following the
17 ISO lab procedures in 2011; is that right?

18 A Yes.

19 Q But in looking at this, were you following the ISO
20 Manual in the lab?

21 A I did not see the owner's manual, no.

22 Q Did anyone ever tell you not to look at the owner's
23 manual?

24 A No.

25 Q The ISO Manual, if you turn back a couple pages,
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1 we're going to go to PLT 040121. Seems like here we're
2 getting in an even more detailed process. Going all the
3 way to PLT 040125; is that right?

4 A Correct.

5 Q And if you look at PLT 0402 -- sorry, 0124, sorry.
6 There's a lot of letters and numbers. Are you there?

7 A Yes.

8 Q And you go down about three paragraphs up from the
9 bottom, it says *For more detailed* -- do you see where
10 I'm at?

11 A Actually I don't, I'm sorry. Oh, yes, I do. Yes.

12 Q Got it? Says "For more detailed procedures, see
13 user manual on ProtoCOL from Synoptics." Do you see
14 that there?

15 A Yes.

16 Q And that's referring to Exhibit 790; right?

17 A Yes.

18 MR. BIANCHI: Your Honor, I would ask to admit
19 Exhibit 778 into evidence.

20 THE COURT: It is admitted.

21 BY MR. BIANCHI:

22 Q Now, you yourself had never calibrated the spiral
23 plater; is that right?

24 A The spiral plater? No.

25 Q But you used to calibrate the ProtoCOL counter for
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1 every plate that you did; right?

2 A Yes. There was a function that we did, yes.

3 Q And when did that stop, do you remember?

4 A I don't remember.

5 Q Do you recall that at some point you spoke with
6 Richard and then you stopped?

7 A I believe that would have been the case, yes.

8 Q And when you were in charge of the lab, Derek was
9 the person that was in charge of production; is that
10 right?

11 A Yes.

12 Q But you said you didn't talk to him about the
13 issues that you saw about the ProtoCOL counter until
14 after Betco had purchased Bio-Systems; is that right?

15 A Correct.

16 Q You do not know which specific products shipped out
17 below spec; isn't that right?

18 A I'm sorry?

19 Q You --

20 A Can you repeat?

21 Q Sure. You don't know which specific products
22 shipped out below spec when Malcolm was running the
23 company.

24 A What particular products?

25 Q Correct.

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1 A Well, yes, we would know.

2 Q You do know?

3 A I mean I couldn't tell you what they are today, but
4 yes, at the time we would do a final check of the
5 product.

6 Q Right. But I'm saying you can't tell me right now
7 a specific product.

8 A Correct.

9 Q And you don't know how many actually went out under
10 spec; correct?

11 A Correct.

12 THE COURT: In the case of percentages you
13 indicated earlier, you indicated it was --

14 THE WITNESS: It was about 30 percent.

15 THE COURT: So do you have an understanding as
16 to whether that's what percentage went out?

17 THE WITNESS: That's correct, yes.

18 THE COURT: You know that because?

19 THE WITNESS: That was an estimated guess.

20 THE COURT: Based on?

21 THE WITNESS: Based on when we tested the
22 product and then we would check the final product that
23 went out the door.

24 BY MR. BIANCHI:

25 Q I'm going to have you look to your TV this time.
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1 We're going to look at Exhibit 760.

2 A Okay.

3 Q Do you recognize this document?

4 A I do.

5 Q What is it?

6 A That would be how to prepare a sample for plating.

7 Q And do you understand that this document, which
8 kind of looks like it follows the ISO Manual section we
9 just looked at; is that correct?

10 A That's correct.

11 Q And again, it references the Proto Spiral Counter
12 by Synoptics?

13 A Yes.

14 Q For more detailed procedures, see the user manual;
15 right?

16 A Yes.

17 Q And you understand that this information was freely
18 shared with customers of Bio-Systems; right?

19 A I would assume it was, yes. I don't know. I'm not
20 sure what the customers got.

21 Q Were you aware that customers would come in and
22 watch you plate count?

23 A Yes.

24 Q Plate and count?

25 A Yes.

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1 Q And Malcolm encouraged that; right?

2 A Yes.

3 Q And in fact, all that time that you were using the
4 Proto counter and the spiral plater, you believed that
5 was an acceptable method to be able to count the
6 bacteria; right?

7 A Yes.

8 MR. BIANCHI: Your Honor, I ask to move 760
9 into evidence.

10 THE COURT: It is admitted.

11 BY MR. BIANCHI:

12 Q In the year 2011, you did not hear anything from
13 Malcolm about not telling employees not to interact with
14 Betco employees; isn't that right?

15 A That's correct.

16 Q And you didn't hear anything from Malcolm about not
17 communicating with Betco employees; correct?

18 A Correct.

19 Q And in fact, you periodically had interactions with
20 Betco employees all throughout 2011; right?

21 A That's correct.

22 Q And you never felt that you were somehow prohibited
23 from speaking with Betco employees during 2011; right?

24 A No.

25 Q So you felt like you could talk to Betco employees;
MINDY WALTERS - CROSS

1 correct?

2 A Yes.

3 Q And I know you mentioned this theoretical count or
4 intermediate count, calculated count. You believed that
5 using that count was perfectly acceptable; right?

6 A Yes.

7 Q Were you ever told to hide --

8 A No.

9 Q Sorry. I apologize. I paused too long. Were you
10 ever told to hide that method of counting Bio-Systems'
11 products?

12 A No.

13 Q The theoretical count.

14 A No.

15 Q In fact, that was something that, as far as you
16 were aware, everyone at Bio-Systems was aware of, the
17 theoretical counts?

18 A Yes.

19 Q After the ISO was completed, you would -- the ISO
20 Manual we looked at, you would review it and make sure
21 it was correct; right?

22 A Review the manual or the --

23 Q The sections that apply to the lab.

24 A Yes.

25 Q Did you ever explain the intermediate count method
MINDY WALTERS - CROSS

1 or the calculated count method to Neil?

2 A Did we explain?

3 Q Did you ever explain it to Neil Seeger? Did you
4 ever explain to Neil that process?

5 A Yes. When he first started I believe I did.

6 Q How about to Kurt Bischoff?

7 A I believe so, yes.

8 Q Do you remember when that was?

9 A I don't remember.

10 Q Would it have been shortly after the purchase of
11 the company?

12 A I would assume, yes.

13 Q So with your involvement with the ISO Manual, you
14 believe that someone could look at it in 2010 and 2011
15 and they would know the processes that the lab was
16 using; right?

17 A Yes.

18 THE COURT: Did you tell either one of them,
19 Seeger or Bischoff, about the amount of product,
20 particularly powder, that were being sold out of spec?

21 THE WITNESS: I believe I would have discussed
22 that with Neil.

23 THE COURT: And when would that have been?

24 THE WITNESS: Maybe around the time he started.
25 I'm not really sure.

MINDY WALTERS - CROSS

1 BY MR. BIANCHI:

2 Q And were you aware that in the wastewater industry
3 that Bio-Systems sells products into that competitors
4 were trying to knock down each other's plate count?
5 Were you familiar with that?

6 A No, I wasn't. No.

7 Q You never tested competitors' products?

8 A Yes, we would. Yes. Um-hmm.

9 Q And would you use the spiral plater and the
10 ProtoCOL counter to test them?

11 A Yes.

12 Q And were you aware that if a customer came and said
13 hey, this competitor tested my product and this count
14 was, you know, something that I wasn't expecting,
15 Bio-Systems came back and said well, this is the method
16 that we use and that's how we got the number.

17 Is that --

18 A I would assume. I never talked to customers, so...

19 Q You never talked to customers.

20 A No.

21 THE COURT: Did you generally find the
22 competitors' numbers were consistent with their specs?

23 THE WITNESS: Yes.

24 BY MR. BIANCHI:

25 Q I'm going to have you look at Exhibit 696.
MINDY WALTERS - CROSS

1 A Okay.

2 Q Jumping back to '98. Do you recognize that
3 document?

4 A Yes, I do.

5 Q Is that your handwriting?

6 A Yes, it is.

7 Q And what is that document? What are we looking at?

8 A That is basically a plate count of what would have
9 been plated on the spiral plater.

10 Q And it references a calibration plate. Do you know
11 what that's referring to?

12 A No, I'm not really sure what the calibration plate
13 was.

14 Q Could it have been to compare a hand count to the
15 ProtoCOL counter?

16 A A manual count?

17 Q Yes.

18 A Probably not a manual count, no.

19 Q So when the column that says method --

20 A Yes?

21 Q -- none of those reference a hand count or manual
22 count? Sorry.

23 A I believe that was done on the spiral plater. You
24 can't do a manual count when it's done on the spiral
25 plater.

MINDY WALTERS - CROSS

1 THE COURT: Are you looking for that,
2 Mr. Bianchi? How much more do you have for this
3 witness?

4 MR. BIANCHI: This is it. May I approach?

5 THE COURT: You may.

6 BY MR. BIANCHI:

7 Q Ms. Walters, I'm going to have you turn to page 63
8 in your deposition, please.

9 A Okay. Okay.

10 Q And if you look, there's a reference to Exhibit
11 151, and that's in line number 9. Do you see that
12 there? It says "I'm going to hand you what's been
13 marked Defendants' Exhibit 151."

14 A Okay.

15 Q "Can you identify what this document is."

16 And you said "Yeah. It says calibration plate. I
17 would assume it's the same as that, but I don't
18 remember, so...

19 Does it look like your handwriting?

20 Yes, it does.

21 So this document appears to be similar to
22 Defendants' Exhibit 150, so another kind of calibration
23 plate?

24 Yes.

25 With a hand count comparing what the ProtoCOL
MINDY WALTERS - CROSS

1 counters count.

2 Right.

3 And again I realize these documents are from '98
4 and the other one 2000. You don't know when that
5 calibration comparison stopped?

6 No. No, I don't."

7 Did I read that correctly?

8 A Yes.

9 MR. BIANCHI: Ask to admit Exhibit 696.

10 THE COURT: It is admitted.

11 MR. BIANCHI: I have no further questions.

12 THE COURT: Any redirect? (3:32 p.m.)

13 MS. GEHRIG: Very briefly, Your Honor.

14 REDIRECT EXAMINATION

15 BY MS. GEHRIG:

16 Q Ma'am, did you ever use manual counting procedures
17 working at Bio-Systems prior to Mr. Peacock's departure?

18 A No.

19 Q And briefly with regard to any sort of calibration
20 or validation, did you discuss anything about the
21 ProtoCOL counter with Mr. Richard Peacock after he, I
22 guess, left the business in 2009?

23 A I'm sorry, can you repeat?

24 Q Mr. Richard Peacock -- you started in 1997.

25 A That's correct.

MINDY WALTERS - REDIRECT

1 Q Okay. And Mr. Richard Peacock, Mr. Malcolm
2 Peacock's son, was employed at the business at that
3 time.

4 A Correct.

5 Q And from that period until 2009, was that the time
6 period that you worked with Mr. Richard Peacock?

7 A Correct.

8 Q Did you work with him in any form or fashion after
9 the acquisition? I'm saying in 2010.

10 A No. I don't believe so, no.

11 Q So any work that Mr. Richard Peacock did with you
12 on the ProtoCOL counter to validate, calibrate, whatever
13 was 2009 or earlier?

14 A Correct.

15 Q Did Mr. Malcolm Peacock direct you to calibrate,
16 validate or do anything with the ProtoCOL counter
17 thereafter?

18 A No.

19 MS. GEHRIG: Thank you, Ma'am. That's all.

20 THE COURT: You may step down.

21 (Witness excused at 3:32 p.m.)

22 THE COURT: Before we take our afternoon break,
23 let me just ask for the plaintiff how much more -- how
24 many more witnesses you have.

25 MS. GEHRIG: Your Honor, I've got three
MINDY WALTERS - REDIRECT

1 witnesses in the waiting, and if -- I don't know how --
2 we could present more today, but I'm thinking that those
3 three might be for the rest of the day.

4 THE COURT: Well, it would really depend on how
5 many more you have in the morning.

6 MS. GEHRIG: We have, I believe, three in the
7 morning: Mr. Seeger, Mr. Kennedy, and Mr. Lyons.

8 THE COURT: And will that complete your
9 case-in-chief on liability?

10 MS. GEHRIG: Yes, Your Honor. In fact --

11 MR. JACKSON: Well, except Mr. Lyons, Your
12 Honor, he's offered for damages, and as I understood --

13 THE COURT: With the exception of Mr. Lyons,
14 that's what I meant. When I said your case-in-chief, I
15 said on liability, not on damages. So I just wanted to
16 make sure. So basically you have six witnesses. Why
17 don't we see where we are.

18 For the defendant, how many witnesses would you
19 expect and how long do you think it will take?

20 MR. BIANCHI: We have a total of five.

21 THE COURT: So realistically?

22 MR. BIANCHI: Three of -- our two experts and
23 Mr. Peacock. At least half a day, it could go a little
24 more. Mr. Peacock will obviously be the biggest chunk
25 of that. And then we have two other witnesses scheduled

1 to come already Wednesday morning that will be very
2 short.

3 THE COURT: Well, I just want to make sure, if
4 we can, if they're reachable -- if it looks like it's
5 getting that we could finish it, we would. Why don't we
6 plan on those three and see where we are. I'm happy to
7 go until 6 anyway. That will at least make some
8 progress, and if we're still concerned about timing, we
9 could start at 8 a.m. But at this point let's just plan
10 on that.

11 Yes, sir.

12 MR. JACKSON: If I might, Your Honor, our last
13 witness, Mr. Lyons, are you anticipating that we're
14 going to bifurcate and that we'll schedule the damage
15 witnesses at some other --

16 THE COURT: No, no. We'll do it all this week
17 if we're going to go forward.

18 MR. JACKSON: Okay. Thank you.

19 THE COURT: The only other matter I had was
20 please feel free to unseal any deposition transcripts
21 that you're going to want to use. It might impress a
22 jury, but just delays things for me. So thank you.

23 Anything more for the plaintiffs?

24 MS. GEHRIG: You mean are we going to take a
25 break?

1 THE COURT: Before we take our break.

2 MS. GEHRIG: No, Your Honor.

3 THE COURT: Sorry. I can be a bit brusque. Why
4 don't we reconvene at 5 to 4. We're in recess. Feel
5 free to move about as you wish.

6 (Recess 3:35-3:53 p.m.)

7 THE COURT: Are we missing a witness?

8 MS. GEHRIG: Your Honor, she's in the back of
9 the courtroom. Ms. Deborah Dare.

10 THE COURT: Very good. You may call your next
11 witness then.

12 MS. GEHRIG: Thank you, Your Honor.

13 THE COURT: And you can actually come right up
14 to the table and be sworn.

15 **DEBORAH DARE, PLAINTIFF'S WITNESS, SWORN,**

16 THE COURT: Please proceed.

17 MS. GEHRIG: Thank you, Your Honor.

18 DIRECT EXAMINATION

19 BY MS. GEHRIG:

20 Q Ms. Dare, would you please state your full name and
21 spell your last.

22 A Deborah Dare. D-a-r-e.

23 Q Where do you currently reside?

24 A Janesville, Wisconsin.

25 Q Where are you employed?

DEBORAH DARE - DIRECT

1 A Bio-Systems International.

2 Q What is your current position?

3 A Sales manager for the Institutional Division.

4 Q And Ma'am, how long have you been employed at the
5 Beloit plant?

6 A Since 2009.

7 Q When you were hired, who owned the Beloit plant?

8 A Malcolm Peacock.

9 Q Did Mr. Peacock interview you?

10 A Yes.

11 Q Who was your immediate supervisor?

12 A Dana Juul.

13 Q And what was Ms. Juul's position?

14 A She was Team 3 lead.

15 Q Who supervised Ms. Juul?

16 A Malcolm.

17 Q Ma'am, as sales manager do you have access to
18 product literature that relates to the products that you
19 sell?

20 A Yes.

21 Q Does that include labels?

22 A Yes.

23 Q And does that include data sheets?

24 A Yes.

25 Q Did those -- were those in existence for your
DEBORAH DARE - DIRECT

1 products, the products that you were selling, at the
2 time you began at Bio-Systems?

3 A Yes.

4 Q And were they kept on what we refer to as an F
5 drive electronically prior to the sale of the company?

6 A Yes.

7 MS. TURKE: Objection. Leading.

8 THE COURT: I'll sustain the objection and I'll
9 strike the answer.

10 BY MS. GEHRIG:

11 Q Ma'am, how were these documents maintained prior to
12 the acquisition?

13 A Electronically on a central drive.

14 Q And what was the name of the drive that -- on which
15 they were kept electronically prior to the acquisition?

16 A The F drive.

17 Q How are they now kept?

18 A Electronically on a central drive named the T
19 drive.

20 Q And how are they categorized or stored?

21 A Some by customer and some by category.

22 Q Ma'am, have there been any significant revisions
23 until prior to Mr. Kennedy reviewing them in 2013?

24 A No.

25 Q Ma'am, were you aware when you started at
DEBORAH DARE - DIRECT

1 Bio-Systems in 2009 that Bio-Systems had an ISO Manual?

2 A I was aware of its existence, yes.

3 Q Were you ever asked to refer to it regarding any
4 specific job duties that were assigned to you?

5 A No.

6 Q How did you learn that the company had been sold in
7 September of 2010?

8 A Malcolm announced it.

9 Q And did Mr. Peacock make a change -- or excuse
10 me -- make a point of saying whether anything would
11 change?

12 A He said nothing would change.

13 Q Did he continue to supervise the staff in your
14 office until November of 2011?

15 A Yes.

16 MS. TURKE: Objection. Leading.

17 THE COURT: I'll sustain the objection and I'll
18 strike the answer.

19 BY MS. GEHRIG:

20 Q Who supervised the sales staff from the time of the
21 acquisition until November of 2011?

22 A Malcolm Peacock.

23 Q Did Mr. Peacock give you any particular
24 instructions regarding who should speak to Betco
25 personnel after the acquisition?

DEBORAH DARE - DIRECT

1 A He said that only Dana Juul or myself should speak
2 to people at Betco.

3 Q Did anything in your department change over the
4 next several months?

5 A No.

6 Q Did any -- were there any significant changes prior
7 to Mr. Peacock's departure?

8 A No.

9 Q Ma'am, I'd like to talk about your job duties
10 between September of 2010 and September of 2011. Did
11 you have contacts with your customers?

12 A Yes.

13 Q For what purpose?

14 A In a sales role quoting new products, providing
15 data sheets, MSDS, just general customer service and
16 sales.

17 Q Did you ever get questions from your customers
18 regarding the products they were purchasing?

19 A Yes.

20 Q Did you ever get questions regarding bacterial
21 counts?

22 A Yes.

23 Q What types of questions?

24 A Wanting to verify the count of a specific product
25 primarily.

DEBORAH DARE - DIRECT

1 Q Did you handle some of those questions yourself?

2 A Yes.

3 Q How did you handle them?

4 A I would refer to the data sheets to get the
5 information or I would ask Dana what the count was.

6 Q So if there were questions you couldn't handle, who
7 would you go to?

8 A Dana.

9 Q Ma'am, were you responsible during that time
10 period, and again September of 2010 until November of
11 2011, for preparing certificates of analysis?

12 A Yep.

13 Q Approximately how many certificates of analysis
14 would you prepare in a given week?

15 A Probably five to ten.

16 Q And approximately what percentage of your customers
17 received a certificate of analysis when Mr. Peacock
18 owned the business?

19 A Probably half.

20 Q And was that the same number during the year after
21 the acquisition?

22 A Yes.

23 Q Ma'am, how are certificates of analysis stored?

24 A Electronically on the F drive.

25 Q Did you keep old ones when you created new ones?

DEBORAH DARE - DIRECT

1 A No. During that time we did not.

2 Q What did you do?

3 A We would pull up -- I would pull up the last
4 certificate of analysis sent to that particular customer
5 and update any necessary information on it and then
6 store it back out under the same name. We only kept one
7 electronic copy.

8 Q And Ma'am, I'm going to direct you to the TV screen
9 in front of you. Does that appear to be a certificate
10 of analysis for one of your clients?

11 A Yes.

12 Q Or customers?

13 A Yes.

14 Q And could you read the date on that?

15 A The certificate date is June 20th, 2011.

16 Q And Ma'am, is that during the period of time where
17 Malcolm continued to be in the plant?

18 A Yes.

19 Q Up in the upper left-hand corner, does this
20 document tell you who the document was approved by?

21 A Yes.

22 Q And who is that?

23 A Malcolm Peacock.

24 Q Now Ma'am, when you went into one of these
25 documents, when you pulled it up to create it for the
DEBORAH DARE - DIRECT

1 customer, could you tell me what information you
2 changed?

3 A Yes. I would change the lot number at the top, the
4 order number, the certificate date, and the ship date,
5 and then I would adjust the actual results on the line
6 where it says *total count*.

7 Q What would you use as a reference for the actual
8 result?

9 A I would take the last number that was entered there
10 and adjust it slightly up or slightly down just to make
11 it different.

12 Q Did you have any access to information produced by
13 the lab when you did that?

14 A No.

15 Q Did you know whether product had been tested?

16 A No.

17 Q Do you know if it had been tested, what the result
18 was?

19 A No.

20 Q Who taught you to do it that way?

21 A Dana.

22 Q Ms. Juul?

23 A Yes.

24 Q And Ma'am, did that process remain in place until
25 after Mr. Peacock left the business in November of 2011?

DEBORAH DARE - DIRECT

1 A Yes.

2 Q Is that how it's done now?

3 A No.

4 Q Do you have any role in preparation of certificates
5 of analysis at this time?

6 A No.

7 Q Do you still get copies of certificates of analysis
8 that go to your customers?

9 A Yes.

10 Q Ma'am, I pulled up a new document. Does that
11 appear to be a certificate of analysis that went to one
12 of your customers?

13 A Yes.

14 Q And in the upper --

15 THE COURT: Before we go off the previous
16 document, was that from a specific exhibit? You said a
17 Bates number.

18 MS. GEHRIG: I beg your pardon, Your Honor. It
19 was from Exhibit 19.

20 THE COURT: Thank you.

21 BY MS. GEHRIG:

22 Q And Ma'am, also from Exhibit 19, 720095 Bate stamp
23 number, is that in front of you right now?

24 A Yes.

25 Q And Ma'am, is this an example of what certificates
DEBORAH DARE - DIRECT

1 of analysis now look like?

2 A Yes, it is.

3 Q Is there a different person's name in the upper
4 left-hand corner?

5 A Yes.

6 Q And who is that?

7 A Mindy Walters.

8 Q And again, Ma'am, you have no -- you get a copy,
9 but you don't participate in the preparation of these
10 documents?

11 MS. TURKE: Objection. Leading.

12 THE COURT: I'll sustain it as cumulative. And
13 you can ask your next question.

14 MS. GEHRIG: Thank you.

15 BY MS. GEHRIG:

16 Q Ma'am, have complaints from customers regarding
17 bacteria counts increased or decreased over time?

18 A Decreased.

19 Q Do you recall when the last complaint you received
20 regarding a bacteria count?

21 A Summer of 2013.

22 Q And how frequently did you get them, let's say,
23 back in 2011/2010?

24 A Several times a year.

25 MS. GEHRIG: Thank you, Ma'am. That's all I
DEBORAH DARE - DIRECT

1 have for now. (4:03 p.m.)

2 CROSS-EXAMINATION

3 BY MS. TURKE:

4 Q Good afternoon, Ms. Dare. After Betco purchased
5 the Bio-Systems plant, you were supervised by Ms. Denise
6 Lennard; correct?

7 A For a time period, yes.

8 Q Okay. And that was after the acquisition?

9 A No, not immediately after.

10 Q But some time after the acquisition you became
11 supervised by Ms. Lennard?

12 A Yes.

13 Q But immediately after the acquisition I think you
14 testified Ms. Juul remained your direct supervisor?

15 A Yes.

16 Q Mr. Malcolm Peacock did not directly supervise you;
17 correct?

18 A No.

19 Q And Mr. Peacock never checked your work, did he?

20 A Not to my knowledge.

21 Q And in fact, you don't know what Malcolm Peacock's
22 role was after Betco acquired Bio-Systems; isn't that
23 correct?

24 A No.

25 Q That's not correct?

DEBORAH DARE - CROSS

1 A No.

2 Q You have an understanding of what Mr. Peacock's
3 role was after the acquisition?

4 A What I was told his role was and how he functioned.

5 THE COURT: Were you directed -- who told you,
6 without telling me what they said, who told you what his
7 responsibilities were?

8 THE WITNESS: Denise Lennard.

9 THE COURT: All right. Next question.

10 BY MS. TURKE:

11 Q Mr. Peacock never told you not to communicate with
12 Ms. Lennard; correct?

13 A No.

14 Q He did not.

15 A He did not.

16 Q And in fact, you had open lines of communication
17 with Ms. Lennard; isn't that right?

18 A Yes.

19 Q And Mr. Peacock never told you not to communicate
20 with any other employee of Betco; isn't that correct?

21 A Correct.

22 Q Now, you talked about certificates of analysis and
23 I think you said about 50 percent of the products that
24 go out have a certificate of analysis; is that correct?

25 A 50 percent of my customers.

DEBORAH DARE - CROSS

1 Q And a customer requests a certificate of analysis;
2 correct?

3 A Yes.

4 Q And when you prepared certificates of analysis, you
5 knew that the lab information was stored on a server;
6 correct?

7 A No, I did not.

8 Q You did not know that. Did you ever ask your
9 supervisor, Ms. Juul, if you could obtain the lab
10 information?

11 A Yes.

12 Q You did. And what did Ms. Juul tell you?

13 A That we did not have access to that.

14 Q Now, when you have a customer complain to you about
15 a product, you go through a process to verify the
16 complaint; don't you?

17 A Yes.

18 Q And there are many factors that could affect why a
19 product is not testing up to specification; correct?

20 A Yes.

21 Q It could be that the product is stored at the
22 incorrect temperature; right?

23 A Correct.

24 Q Or the product is stored with a humidity level
25 that's too high or too low; right?

DEBORAH DARE - CROSS

1 A For some products, yes.

2 Q And it could be that the product is being dispensed
3 in an incorrect manner; correct?

4 A Yes.

5 Q There could be contamination after it's delivered
6 to the customer; correct?

7 A Yes.

8 Q And you'll agree with me that not every customer
9 complaint about a product proves to be accurate or true.
10 In other words, the product isn't always off spec;
11 correct?

12 A Correct.

13 Q And you're familiar with the spiral plater counting
14 that Betco -- excuse me -- that Bio-Systems used before
15 Betco bought it?

16 A Yes.

17 Q And you are aware that customers were informed and
18 the spiral counting method -- excuse me -- spiral
19 plating and ProtoCOL method were disclosed to customers;
20 correct?

21 A Not to every customer.

22 Q And were you aware that some customers would ask
23 about the method of plate counting that was done in
24 2009/2010?

25 A Yes.

DEBORAH DARE - CROSS

1 Q And in those cases did you freely share with them
2 what the method was that was used?

3 A No, I did not.

4 Q You did not?

5 A No.

6 MS. TURKE: May I approach, Your Honor?

7 THE COURT: You certainly may.

8 BY MS. TURKE:

9 Q Ms. Dare, could you please turn to page 51 of your
10 deposition. Are you there?

11 A Yes.

12 Q Okay. I'm going to read starting at line 7:

13 "Question: Were you aware in 2009/2010 what the
14 procedure for standard plate count was at Bio-Systems?

15 "Answer: It was -- it was my understanding that we
16 were using the spiral plater count.

17 "Question: Did customers ever ask about how
18 Bio-Systems did a plate count in 2009/2010?

19 "Answer: Yes.

20 "Question: And did you freely share with the
21 customer how plate count was done?

22 "Answer: Yes. That we were using the spiral plate
23 counter; that it was an advanced method."

24 Did I read that correctly?

25 A Yes, you did.

DEBORAH DARE - CROSS

1 MS. TURKE: I have nothing further. Thank you.

2 THE COURT: Any redirect?

3 MS. GEHRIG: No, Your Honor.

4 THE COURT: You may step down, Ms. Dare. Thank
5 you. You may call your next witness.

6 (Witness excused at 4:09 p.m.)

7 MS. GEHRIG: Mr. Gerson Artreche, Your Honor.

8 THE COURT: Mr. Artreche, if you would just
9 stand before the court reporter here and be sworn.

10 **GERSON ARTRECHE, PLAINTIFF'S WITNESS, SWORN,**

11 THE COURT: You may proceed.

12 DIRECT EXAMINATION

13 BY MS. GEHRIG:

14 Q Mr. Artreche, would you state your full name and
15 spell your last.

16 A Gerson Artreche. A-r-t-r-e-c-h-e.

17 Q Sir, where do you currently reside?

18 A Beloit, Wisconsin.

19 Q And are you employed at Bio-Systems?

20 A I am.

21 Q What is your current position?

22 A International sales manager.

23 Q How long have you worked at the Beloit plant?

24 A Approximately nine years.

25 Q Did you work at Bio-Systems before it was acquired?
GERSON ARTRECHE - DIRECT

1 A Yes.

2 Q And what was your position immediately prior to the
3 acquisition?

4 A Prior to the acquisition I was filing documents and
5 faxing.

6 Q At some point did you become a team leader?

7 A I did, yes, at some point.

8 Q In approximately what time frame?

9 A About 2008.

10 Q Who taught you your job duties in that position?

11 A Betty Salazar.

12 Q Was she on her way out? Did you replace her?

13 A I did.

14 Q And sir, who supervised you in your position of
15 team leader after Ms. Salazar left?

16 A Malcolm Peacock.

17 Q Sir, were you aware back when you started at
18 Bio-Systems that Bio-Systems had an ISO Manual?

19 A I was not aware.

20 Q Were you ever asked to review any portion of an ISO
21 Manual in reference to your own job duties?

22 A No.

23 Q At any time during your employment at Bio-Systems?

24 A No.

25 Q Sir, as team leader of international sales, do you
GERSON ARTRECHE - DIRECT

1 have access to product literature?

2 A Yes.

3 Q What does that include?

4 A That includes product data sheets, MSDS and COAs.

5 Q How was that stored?

6 A It was stored on a shared drive.

7 Q Has there been any significant changes to the
8 literature for your products since the departure of
9 Mr. Peacock --

10 A Yes.

11 Q -- prior -- okay. And who did that?

12 A Mr. Keith Kennedy.

13 Q Was the literature in place when you took your
14 place as team leader of international sales?

15 A Yes, Ma'am.

16 Q And sir, did you make any significant changes to it
17 from the time that you took it over until Mr. Kennedy
18 revised it?

19 A No, Ma'am.

20 Q Sir, did Mr. Peacock either supervise you or
21 supervise your supervisor from the time you started at
22 Bio-Systems until he left the plant in 2011?

23 A Yes.

24 Q How did you become aware that Betco had purchased
25 Bio-Systems?

GERSON ARTRECHE - DIRECT

1 A Mr. Malcolm Peacock came into the sales office and
2 announced it.

3 Q What, if anything, did he tell you about changes --
4 any changes that would take place in your workplace as a
5 result of the acquisition?

6 A He basically said business as usual. No changes.

7 Q Did you still consider him to be your boss?

8 A Yes.

9 Q I'd like to talk to you about your job duties from
10 October of 2010 until November of 2011. If we could
11 pull up a sample from Exhibit 19, Bates number 718262.

12 Sir, during that time period were you responsible
13 for preparing certificates of analysis for your
14 products?

15 A Yes.

16 Q And when I say *your products*, products that went to
17 your customers.

18 A Correct.

19 Q Approximately how many would you prepare in a week?

20 A One or two.

21 Q What information would you fill out? And again,
22 please feel free to refer to the document in front of
23 you. What information would you fill out on the
24 certificate of analysis?

25 A The lot number, order number, certificate date,
GERSON ARTRECHE - DIRECT

1 shipment date, and total count.

2 Q And sir, where did you get information for the
3 total count?

4 A From a previous certificate of analysis.

5 Q Describe what you did.

6 A I basically took the last product certificate of
7 analysis that went out to the customer and I would
8 change the date, the order number, shipment date, and
9 total count.

10 Q And where did you get that number for total count?

11 A From a previous certificate of analysis.

12 Q Did you have any access to lab data for that
13 number?

14 A I did not.

15 Q Did you know whether that product had been tested?

16 A I did not.

17 Q Sir, is a UR block, is that an extruded solid
18 product?

19 A It is.

20 MS. TURKE: Objection. Leading.

21 THE COURT: I'll overrule it. You can ask your
22 next question.

23 MS. GEHRIG: Thank you.

24 BY MS. GEHRIG:

25 Q Did you ever ask Mr. Peacock about this method of
GERSON ARTRECHE - DIRECT

1 certificate of analysis preparation?

2 A I believe once I questioned it.

3 Q And what did he say?

4 A Oh, that's the way things are done.

5 Q Sir, for what types of products -- when I say type
6 I'm talking about whether it's a solid, a liquid or a
7 powder -- for what type of product did you prepare a
8 certificate of analysis?

9 A For all products that went out to the customer that
10 were either liquid, solid or powder product.

11 Q And sir, were any of these products shipped to
12 foreign countries?

13 A Yes.

14 Q And were any of these products for the intended use
15 in wastewater treatment plants?

16 A Yes.

17 Q Sir, who taught you the method of certificate of
18 analysis preparation you've described?

19 A Betty Salazar.

20 Q Who supervised Ms. Salazar at the time she taught
21 you that process?

22 A Mr. Malcolm Peacock.

23 Q And sir, is that the way you do it today?

24 A No.

25 Q Sir, do you have responsibility for invoicing your
GERSON ARTRECHE - DIRECT

1 customers or making sure they get invoices?

2 A At this particular moment?

3 Q Back in 2010 to 2011, did you have responsibility
4 for generating invoices?

5 A No.

6 Q Did you get copies of invoices that went to your
7 customers?

8 A Occasionally.

9 Q Did you provide data that went into invoices?

10 A No.

11 Q Did you get copies of invoices?

12 A Yes.

13 Q And sir, how are invoices stored?

14 A They are actually generated electronically and they
15 go out directly to the customer. Are you speaking now?

16 Q Sir -- I apologize. I have not been clear. Back
17 in 2010 and 2011, during the time period that
18 Mr. Malcolm Peacock was supervising you, how were
19 invoices stored?

20 A On a shared drive.

21 Q You had access to them?

22 A To specifically commercial invoices, if that's what
23 you're referring to, Ma'am.

24 Q And sir, did you, during that time period, have a
25 client named EMVI (sic)?

GERSON ARTRECHE - DIRECT

1 A Yes, from the Philippines.

2 Q And sir, did you cause invoices to go to that
3 client in any particular way?

4 A Yes. Electronically.

5 Q Sir, I'd like to draw your attention to a set of
6 invoices, and I guess this is reaching back to 2009.
7 Was this one of your customers in 2009?

8 A Yes.

9 Q And sir, looking at a document in front of you on
10 the screen, is this an invoice that went to your
11 customer in 2009?

12 A Yes.

13 Q And what is the total amount due on that invoice?

14 A \$22,080.

15 Q And if you would switch to -- this is Exhibit 10,
16 Bio-Ohio 79983. If you would switch to 379984. Sir,
17 what is this?

18 A This is a commercial invoice.

19 Q And sir, were both of these invoices, the one you
20 just looked at and the one you're looking at now, for
21 the same product?

22 A Yes.

23 Q To the same customer?

24 A Correct.

25 Q Were they for the same amount?
GERSON ARTRECHE - DIRECT

1 A No, Ma'am.

2 Q What was -- why did you cause two different
3 invoices to go to this client?

4 A One was the actual payable invoice and this one
5 here that we're looking at is for customs.

6 Q Who taught you to do it that way?

7 A Mr. Malcolm Peacock.

8 Q And if we could turn to another example from
9 Exhibit 10, is this a 2010 invoice, sir, that you're
10 looking at now?

11 A It is.

12 Q And is that, looking at the document number in the
13 lower right-hand corner, 379985?

14 A Yes.

15 Q And sir, is that to the same customer?

16 A Yes. Environmental Ventures.

17 Q And the invoice, is that the -- what amount is the
18 invoice for?

19 A A payable \$22,080.

20 Q And if we could switch to 379986. Sir, is that a
21 second invoice?

22 A Commercial invoice.

23 Q For the same product?

24 A Correct.

25 Q To the same customer?

GERSON ARTRECHE - DIRECT

1 A Yes.

2 Q And if we could go to another two documents from
3 Exhibit 10 starting with 379987. Is that another
4 invoice to your customer?

5 A Yes.

6 Q And for what amount was that?

7 A \$22,080.

8 Q And if we would switch to 379988, is this another
9 invoice for the same product?

10 A Yes.

11 Q And for what amount?

12 A \$6,000.

13 Q Sir, did someone from Betco, did this last set of
14 invoices come to the attention from -- to someone from
15 Betco in 2011?

16 A Yes, Ma'am.

17 Q And did you have a discussion with Mr. Peacock
18 about the situation?

19 A Absolutely.

20 Q And would you describe your conversation with
21 Mr. Peacock.

22 A Well, the conversation was about the different
23 amounts, one set at \$22,080 and the one going into
24 customs at \$6,000.

25 Q And which one was the client paying?
GERSON ARTRECHE - DIRECT

1 A The client was paying \$22,080 I believe it was.

2 Q What did Mr. Peacock say to you about this process?

3 A He said this is how we do business in the
4 Philippines.

5 Q And sir, did you -- did Betco allow you to continue
6 to do business that way?

7 A No, Ma'am.

8 Q If we could turn to Exhibit 10, 2011, invoices, is
9 this for the same client number, 379989?

10 A Yes, Ma'am.

11 Q And for what amount is this invoice?

12 A \$22,972 -- I believe it says 90 cents. My eyes are
13 failing me here.

14 Q It's that time of day. And the next document,
15 please? Is this 379990, sir?

16 A Yes.

17 Q And is that a second invoice for the same amount as
18 the first?

19 A Yes.

20 Q Sir, prior to this invoice -- what is the date on
21 this invoice?

22 A This invoice is December 21st, 2011.

23 Q Prior to issuing this last set of invoices, were
24 all the invoices that you recall sending out for this
25 client prepared in the way of the 2009/2010 and earlier
GERSON ARTRECHE - DIRECT

1 2011 invoices?

2 A That is correct.

3 Q Sir, after sending out this invoice, did you get
4 any more orders from this client?

5 A This was the last order.

6 Q Sir, are you bilingual?

7 A I am.

8 Q In fact, are you trilingual?

9 A I am.

10 Q Does that facilitate your communication with some
11 clients in foreign countries?

12 A Yes, Ma'am.

13 Q Sir, after the sale of the business did you become
14 aware of an issue with a client Tan Chee Hong?

15 A Yes, Ma'am.

16 Q And where is Tan Chee Hong located?

17 A He is located in Malaysia, Kuala Lumpur.

18 Q How long has Mr. Hong been a client of Bio-Systems?

19 A If my mind recollects, 14/15 years, maybe more.

20 Q And sir, what was the problem?

21 A We had sent a product, AQ 500 specifically. It was
22 supposed to be at a 5-billion count and it was an actual
23 1.4, -5, -6, -7, I can't recall the exact. It was just
24 a lower count.

25 Q Okay. And sir, when you say it was a lower count,
GERSON ARTRECHE - DIRECT

1 do you mean it tested lower or that the product spec
2 sheet actually had it at a much lower count?

3 A The actual product data sheet had it at a 5-billion
4 count.

5 Q Okay. But how did you find out that he was getting
6 a lower count product then?

7 A It was a conversation I believe I had with
8 Ms. Denise Lennard.

9 Q Okay. And how did you deal with this situation?

10 A I recall it vividly. It was about 11 p.m.
11 Ms. Denise Lennard and myself, we called Tan Chee Hong
12 in Malaysia and we spoke to him about the actual problem
13 that we were having.

14 Q And how did you resolve that problem with Mr. Hong?

15 A We let him know that we would have to make his
16 product at spec and charge him more for the product than
17 what he was paying because we were losing money on
18 pricing.

19 Q Was it your impression from your conversation with
20 him -- did he think that he had been getting the product
21 that he was paying for?

22 MS. TURKE: Objection. Hearsay.

23 THE COURT: Sustained.

24 BY MS. GEHRIG:

25 Q And sir, does he continue to be a client?
GERSON ARTRECHE - DIRECT

1 A Yes, he is.

2 Q Okay.

3 MS. GEHRIG: Thank you, sir. That's all for
4 now. (4:23 p.m.)

5 THE COURT: Cross-examination.

6 CROSS-EXAMINATION

7 BY MS. TURKE:

8 Q Good afternoon.

9 A Good afternoon.

10 Q So you're a salesperson; right, Mr. Artreche?

11 A I am.

12 Q And you get paid on commission; right?

13 A Part.

14 Q In part? So if customers buy products and pay for
15 them, then you earn a percentage of that?

16 A That is correct.

17 Q And so you don't make that portion of your salary
18 if you do not get the sale done; correct?

19 A Correct.

20 Q And you are doing very well as a salesperson with
21 Betco owning Bio-Systems; is that correct?

22 A That is correct.

23 Q In fact, your sales have increased 12 percent since
24 Betco took over?

25 A Approximately, yes.

GERSON ARTRECHE - CROSS

1 Q Now, with respect to your preparing certificates of
2 analysis, you never questioned Ms. Salazar about the
3 instructions she gave you?

4 A I never did.

5 Q And you can't recall any specifics about your
6 conversation. I think you testified that you spoke to
7 Malcolm Peacock about certificates of analysis; is that
8 correct?

9 A Specifics, what do you mean?

10 Q Do you remember when you spoke with Mr. Peacock?

11 A I don't have that information in front of me. No,
12 Ma'am.

13 Q You don't remember what he would have said or what
14 you would have said either; correct?

15 A Oh, business as usual is what he would respond.

16 Q And you know, Mr. Artreche, that sometimes testing
17 data can be wrong or a false positive can be shown;
18 correct?

19 A Sure. Yes.

20 Q And you would agree with me that counting bugs is a
21 tricky business.

22 A Yes.

23 Q Just to confirm, the issue you spoke with with your
24 attorney dealing with the Philippines, you spoke with
25 Betco about that in July of 2011; is that correct?

GERSON ARTRECHE - CROSS

1 A I can't recall the exact date, but I did speak to
2 them after the acquisition.

3 Q Okay. But prior to the fall of 2011?

4 A I can't recall.

5 Q Now, this issue with Tan Chee, first of all Tan
6 Chee continues to be a customer; correct?

7 A Yes.

8 Q And they buy a lot of product?

9 A They do.

10 Q And in fact, they ended up buying the same or more
11 product even after this incident that you discussed;
12 correct?

13 A Well, without looking at the books, that seems kind
14 of right.

15 Q Seems right to you?

16 A Yeah.

17 Q And the product that was being sold at Tan Chee,
18 was that called Biota AQ 500?

19 A Correct.

20 Q Okay. Now, to your knowledge nobody tested the
21 product that had been previously shipped to Tan Chee to
22 know whether or not it met spec; correct?

23 A Correct.

24 Q You have no idea whether it met spec.

25 A I have no idea.

GERSON ARTRECHE - CROSS

1 Q So you can't confirm or disprove the Tan Chee
2 customer complaint; correct?

3 A I'm not understanding the question.

4 Q You don't know -- well, I'm asking you, you don't
5 know, you don't have any personal knowledge as to
6 whether the product that was shipped to Tan Chee met
7 spec or not?

8 A Correct.

9 Q Okay.

10 MS. TURKE: I have nothing further. Thank you.

11 THE COURT: Any redirect? (4:26 p.m.)

12 MS. GEHRIG: No. Thank you, Judge.

13 THE COURT: I just have to ask you because I
14 thought you said originally when you -- just before the
15 acquisition you were filing and faxing?

16 THE WITNESS: Yes. When I first was employed
17 at Bio-Systems.

18 THE COURT: You came in originally --

19 THE WITNESS: I came in originally, yes, in
20 2006, just to file.

21 THE COURT: And worked your way up to the
22 process that you've just described.

23 THE WITNESS: That is correct.

24 THE COURT: All right. I've got it now. You
25 may step down. Thank you.

GERSON ARTRECHE - CROSS

1 THE WITNESS: Thank you.

2 (Witness excused)

3 MS. GEHRIG: Thank you. Ms. Dana Juul, Your
4 Honor.

5 THE COURT: Ms. Juul, if you would stand before
6 the court reporter to be sworn.

7 **DANA JUUL, PLAINTIFF'S WITNESS, SWORN,**

8 THE COURT: You may proceed.

9 DIRECT EXAMINATION

10 BY MS. GEHRIG:

11 Q Ms. Juul, would you please state your full name and
12 spell your last.

13 A Dana Juul. J-u-u-l.

14 Q Where do you currently reside?

15 A Roscoe, Illinois.

16 Q And where are you employed?

17 A Bio-Systems.

18 Q How long have you worked at Bio-Systems?

19 A 14 years.

20 Q Was that your first full-time job?

21 A Yes.

22 Q What is your current position?

23 A Sales manager for a private label and customer
24 service manager.

25 Q Did you work at -- you worked at the business
DANA JUUL - DIRECT

1 before it was acquired?

2 A Correct. Yes.

3 Q And sir -- or excuse me, Ma'am, what was your
4 position immediately prior to the acquisition?

5 A I was team lead for our Team 3.

6 Q Ma'am, who taught you your job duties?

7 A There was a variety of office managers from when I
8 started through the years.

9 Q Did you train any new -- excuse me. Did
10 Mr. Peacock supervise the office managers?

11 A Yes.

12 Q Did you train any new employees or employees who
13 started after you did?

14 A I did. Deborah Dare and Sonja Capes.

15 Q Ma'am, as team leader of the private label
16 products, did you have access to product literature?

17 A I did.

18 Q Does that include labels that appear on product
19 packaging?

20 A Yes.

21 Q Does it also include data sheets?

22 A Yes.

23 Q Was that literature in place for your products when
24 you started or did you develop it yourself?

25 A The majority of it was all in place.

DANA JUUL - DIRECT

1 Q And did you have access to those materials?

2 A I did.

3 Q How are they stored?

4 A They were electronically on a shared drive.

5 Q What did you call that drive before the
6 acquisition?

7 A It was the F drive.

8 Q Did that change after?

9 A Yes. It is now the T drive.

10 Q Were they stored by customer or otherwise?

11 A Primarily the data sheets that I would access are
12 by customer because of the private label, but they were
13 also stored by product.

14 Q Did you regularly access these materials for your
15 customers?

16 A Yes.

17 Q Did you distribute them to your customers?

18 A Yes.

19 Q Were they modified as necessary to fit the needs of
20 new clients?

21 A Yes.

22 Q And was that modification -- were the modifications
23 under Mr. Peacock's review?

24 A Yes.

25 Q Ma'am, were there any significant changes to your
DANA JUUL - DIRECT

1 products literature between September of 2010 and a
2 review by Mr. Kennedy in 2013?

3 A There was not.

4 Q Ma'am, did Mr. Peacock either supervise you or
5 supervise your supervisors until he left the business?

6 A Yes.

7 Q Were you aware back in 2000 when you began that
8 Bio-Systems had an ISO Manual?

9 A I was.

10 Q Were you ever asked to review the ISO Manual in
11 reference to your own job duties?

12 A No, I was not.

13 Q Do you recall ever reviewing any portion of the ISO
14 Manual?

15 A I reviewed one procedure for plate count so I could
16 communicate that to my customer, like the actual steps.

17 Q Why did you do that?

18 A I was requested from a customer how we perform that
19 task.

20 Q Ma'am, how did you learn of the sale of Bio-Systems
21 to Betco?

22 A Malcolm told Derek Loverich, Chrissy Stratton, and
23 myself.

24 Q Did he tell you whether there would be any changes?

25 A He specifically said there would be no changes.

DANA JUUL - DIRECT

1 Q Did he continue to supervise you?

2 A Yes.

3 Q And Ma'am, did you believe he continued to have the
4 power to fire you if he chose?

5 A Yes.

6 Q Ma'am, did Mr. Peacock ever express anger or
7 frustration with Mr. Betz in your presence?

8 A I don't recall specific incidents.

9 Q Did Mr. Peacock say anything to you that caused you
10 to restrict communications with Betco or between Betco
11 personnel and others in the plant?

12 A I was told that Denise Lennard in particular should
13 be directed to him; if calls were to come in, to
14 transfer those.

15 Q So -- and just so that I understand, were these if
16 Ms. Lennard was requesting to speak to you or to other
17 people or what?

18 A Both.

19 Q Okay. Did you ever overhear him complaining about
20 Mr. Loverich?

21 A Yes.

22 Q And what was he saying about Mr. Loverich?

23 A That he was going direct to Betco and not going
24 through Malcolm.

25 Q Ma'am, with regard to your job duties from October
DANA JUUL - DIRECT

1 of 2010 until Mr. Peacock quit working in the Beloit
2 plant in 2011, did you have responsibility for customer
3 contacts?

4 A Yes.

5 Q And directing your attention to what's been marked
6 as Exhibit 9, an email, did you communicate with your
7 clients by email?

8 A Yes.

9 Q And do you recognize the document that's in front
10 of you?

11 A Yes.

12 Q What is this an email of?

13 A This is a concern that a Canadian distributor had
14 regarding the plate count of a liquid concentrate that
15 he purchased.

16 Q And Ma'am, what's the date of this email?

17 A June 15th, 2011.

18 Q So was this in the time period after the
19 acquisition and before Mr. Peacock left?

20 A Yes.

21 Q Did you forward this client's concerns to
22 Mr. Peacock?

23 A Yes.

24 Q And for purposes of understanding Mr. Peacock's
25 response, what were the client's concerns?

DANA JUUL - DIRECT

1 MS. TURKE: Objection. Hearsay.

2 THE COURT: I'll overrule it, but it won't be
3 accepted for the truth of the matter asserted.

4 And you may proceed.

5 THE WITNESS: The product that he purchased was
6 stated at a 4,000 billion count and that would be
7 diluted to a ready-to-use product. And when he had it
8 tested, it was in the millions as opposed to billions.
9 He also had competitive products tested and those all
10 tested out at spec, so he was concerned why this
11 particular formula didn't pass and the others did.

12 BY MS. GEHRIG:

13 Q And did you forward that to Mr. Peacock?

14 A I did.

15 Q And what was his response?

16 A That that's a typical problem that we have in
17 Canada.

18 Q And for purposes of understanding your
19 interpretation of that, what, if anything, was
20 significant about Canada?

21 A The testing method is what was explained to me by
22 Mr. Peacock; that they do a different plating method and
23 not all of the bacteria would show up on that, so it
24 gave a low count.

25 Q Ma'am, were you responsible between October of 2010
DANA JUUL - DIRECT

1 and November of 2011 for preparing certificates of
2 analysis for your customers' products?

3 A Yes.

4 Q And drawing from Exhibit 19 Betco 75481, Ma'am,
5 does that document look like it would have gone to one
6 of your clients?

7 A Yes.

8 Q And the date on it is January 5th of 2011?

9 A Correct.

10 Q Okay. Ma'am, can you tell me the process that you
11 used to generate this certificate of analysis?

12 A We would go into the F drive, now T drive, pull up
13 the previous certificate which is basically functioning
14 as a template, change the lot number, order number,
15 certificate date, shipment date, the product code if
16 there was a different product, shipping information, and
17 then the actual results for the count.

18 Q Ma'am, how did you get the actual test result to
19 plug into this document?

20 A That was not an actual number, it was just varied
21 based off of the last certificate issued.

22 Q Did you have any idea whether this product had been
23 tested?

24 A I did not.

25 Q Or if it had been tested what the result was?
DANA JUUL - DIRECT

1 A No.

2 Q Who instructed you to do it this way?

3 A Malcolm Peacock.

4 Q And can you approximate -- do you remember the
5 approximate time frame of when he instructed you to do
6 it that way?

7 A 2006/2007.

8 Q And did -- when Mr. Peacock instructed you, did he
9 tell you why you were being -- you were doing it this
10 way instead of a different way?

11 A It was to save time.

12 Q Did you train anyone else to prepare certificates
13 of analysis that way?

14 A I did. Deborah Dare and Sonja Capes.

15 Q Which of your customers got certificates of
16 analysis, Ma'am?

17 A Anyone that requested it.

18 Q And approximately how many certificates of analysis
19 did you prepare in this fashion, I guess per week,
20 during the time period of September 2010 to November of
21 2011?

22 A Anywhere from three to six a week.

23 Q Did you save each document that went out to a
24 client?

25 A No. The information was saved over each time.
DANA JUUL - DIRECT

1 Q And Ma'am, did any -- this went to Canada looking
2 at the C of A. Did any of your C of A clients, were
3 they overseas?

4 A Yes.

5 Q Do you have new procedures now?

6 A Yes.

7 Q Do you currently prepare your own certificates of
8 analysis?

9 A I do not.

10 Q Ma'am, were you assigned some responsibilities
11 associated or in relation to Betco immediately after the
12 acquisition?

13 A Yes. In addition to purchasing Bio-Systems, they
14 would also be buying product from us. So it was under a
15 private label, so I was working with them as a customer.

16 Q And who primarily did you communicate with at Betco
17 with regard to that?

18 A At that time it was John Henson and Kurt Bischoff.

19 MS. GEHRIG: And Your Honor, I have not been
20 asking to admit the specific portions of Exhibit 19 that
21 the clients -- that the --

22 THE COURT: 19 was admitted already through
23 Ms. Walters. It was 10 and 9 you don't have admitted.

24 MS. GEHRIG: I thought it was 16. But 19 has
25 already been admitted through Ms. Walters?

DANA JUUL - DIRECT

1 THE COURT: Yes.

2 MS. GEHRIG: Then I move to admit the other
3 two.

4 THE COURT: 16 was also admitted through
5 Ms. Walters. I'll admit 10 and 9.

6 MS. GEHRIG: Thank you, Your Honor.

7 THE COURT: Cross-examination. (4:36 p.m.)

8 CROSS-EXAMINATION

9 BY MS. TURKE:

10 Q Hi, Ms. Juul. While you worked at Bio-Systems
11 under Malcolm Peacock, you relied on Mr. Peacock to
12 answer all sorts of technical questions, didn't you?

13 A Yes.

14 Q He was very knowledgeable about the correct
15 application of products; right?

16 A Yes.

17 Q And you preferred to consult with Mr. Peacock over,
18 for example, Mr. Loverich with respect to those
19 application questions; correct?

20 A That was just the channel that I had.

21 Q But you thought that Mr. Peacock would give you a
22 better answer on those areas of application; correct?

23 A Yes.

24 Q He was more knowledgeable; correct?

25 A That was -- he was my boss, so he was who I went
DANA JUUL - CROSS

1 to.

2 THE COURT: The question is did you view him as
3 more knowledgeable?

4 THE WITNESS: For applications, yes.

5 BY MS. TURKE:

6 Q Now, in your experience you said you worked with --
7 you've been at Bio-Systems for what? 14 years?

8 A Yes.

9 Q Would you say it's a common occurrence that
10 customers have concerns about products?

11 A Yes.

12 Q And sometimes there's a fix by either giving the
13 client a different product; maybe it's an application
14 question. Do you agree with that?

15 A Yes.

16 Q Sometimes you have to change the dosing that
17 they're using, the dosage of the product; right?

18 A Correct.

19 Q And it's not necessarily always a human error or a
20 low count; correct?

21 A Not always; correct.

22 Q So let's talk a minute about your certificate of
23 analysis preparation. When you first started at
24 Bio-Systems, I believe you used a spreadsheet and looked
25 up a lot number to find the testing results; is that

DANA JUUL - CROSS

1 right?

2 A Correct.

3 Q I'm going to show you -- I'm going to show you what
4 has been marked as Exhibit 763. Do you recognize this
5 document? Just starting on the first page, it says
6 *Basics*. It talks about Team 1 being international.
7 Team 2: Bio-Systems and Enviro-zyme. Team 3: Private
8 label.

9 A Vaguely, yes.

10 Q Do you have an idea of what this is? First of all,
11 do you think you prepared it?

12 A No.

13 Q Okay. Let's talk about this open ACT database. Do
14 you know what the ACT database is?

15 A The ACT database was our contact database; stores
16 customer information and notes about calls and emails
17 that you received.

18 Q Okay. And was that a database that you used or
19 still use at Bio-Systems?

20 A Do not, no.

21 Q Was it a database you used when Mr. Peacock owned
22 the company?

23 A Yes.

24 Q And then it talks about a sign-on and password.

25 Did you have a sign-on and password to access that
DANA JUUL - CROSS

1 database?

2 A Yes.

3 Q Okay. So the rest of the document -- and in fact
4 I'm going to --

5 MS. TURKE: Your Honor, I'll approach to give
6 the witness a full copy.

7 THE COURT: That's fine.

8 BY MS. TURKE:

9 Q It might be easier if you look at the full
10 document. If you would just briefly review and then
11 I'll ask you a couple questions.

12 THE COURT: Again, this is Exhibit 736?

13 MS. TURKE: 763.

14 THE COURT: 763. I apologize.

15 BY MS. TURKE:

16 Q Have you had a chance to review it?

17 A Um-hmm.

18 Q Would you agree with me that the contents of
19 Exhibit 763 appear to be a series of instructions and/or
20 procedures that are used at Bio-Systems when Mr. Peacock
21 owned the company?

22 A Yes.

23 Q Okay. I'd like to direct your attention to --
24 there's a tiny number that starts PLT on the bottom
25 right-hand side of the page. Do you see that?

DANA JUUL - CROSS

1 A Yes.

2 Q I'd like to direct you to PLT 038573. And I can
3 also put it up on the TV screen if you want to look at
4 it. Do you want to compare that what I have on the
5 screen is what you're looking at now in your hand?

6 A Yes.

7 Q Okay. So this appears to be notes about the CoA or
8 certificate of analysis?

9 A Yes.

10 Q Are you familiar with the instructions or list that
11 follows under certificate of analysis?

12 A Yes.

13 Q Okay. And it says *usually done at invoicing*. Does
14 that refer to when certificates of analysis are
15 typically done?

16 A Yes, when they're generated.

17 Q So they're prepared when the invoice is going to be
18 generated.

19 A Correct.

20 Q Okay. And then it references a *G:LOTFP*. Could you
21 tell me what that is or what that refers to?

22 A That was a folder on -- looks like the G drive.

23 Q Okay. And was that a folder that you would have
24 access to when you worked at Bio-Systems under
25 Mr. Peacock's direction?

DANA JUUL - CROSS

1 A I don't recall using the G drive, no.

2 Q Do you know what the G drive is?

3 A I'm not sure, no.

4 Q Okay. The next line says *Look up by lot number.*

5 Do you see that?

6 A Um-hmm.

7 Q Does that refer to the lot number of a product?

8 A Right. The lot number for the particular batch of
9 product.

10 Q Okay. And then the next line says *Need number to*
11 *the right on bottom either under 48-hour or 72-hour.*

12 Do you see that?

13 A Yes.

14 Q Would that refer to testing results that were done
15 by testing a product either for 48 hours or 72 hours?

16 A It could.

17 Q Okay. And then the next line says *Take the first*
18 *two digits before the decimal and put a decimal between*
19 *them* and says that is or *i.e. 52.44 will be 5.2.*

20 Do you see that?

21 A Yes.

22 Q Is this consistent with instructions you received
23 at Bio-Systems about reporting or creating a certificate
24 of analysis?

25 A This was the original instructions that I was
DANA JUUL - CROSS

1 given, yes.

2 Q Okay.

3 A When I first started.

4 Q And then a little bit further down it says
5 *Companies that request CoA are Ecological Labs, MITCO,*
6 *Garrett Callahan and Nalco.* Do you see that?

7 A Yes.

8 Q Would you agree with me that not every customer of
9 Bio-Systems requested a certificate of analysis?

10 A Correct.

11 Q Now, with respect to the certificates of analysis,
12 you'll agree with me that what Bio-Systems was doing was
13 guaranteeing that these products met a minimum bacterial
14 count; correct?

15 A Yes.

16 Q And so Bio-Systems' responsibility in selling the
17 product with the certificate of analysis was to deliver
18 a product that met that minimum bacteria count; correct?

19 A Correct.

20 Q And you would have had no problem explaining this
21 certification process to anyone who asked you; correct?

22 A Correct.

23 Q This was not a secret at Bio-Systems; correct?

24 A That we sort of had the minimum count?

25 Q Correct.

DANA JUUL - CROSS

1 A No, it was not.

2 Q And you don't have any recollection of any customer
3 product count complaints during the time frame January
4 29th to November 2011; right?

5 THE COURT: I'm sorry, January 29th, 2000 --

6 MS. TURKE: 2009 through -- I'm sorry, did I
7 say this incorrectly? I'll strike that.

8 THE COURT: Try again.

9 BY MS. TURKE:

10 Q You don't recall any customer product complaints in
11 this time frame, January 2009 through November 2011?

12 A The count complaints, yes.

13 Q You do recall customer complaints about count
14 during that time period?

15 A The -- if I'm remembering the date that was just
16 up, that was 2011.

17 Q January 2009 through November 2011.

18 A Right. I believe the email was in June of 2011 for
19 the concentrate, the Canada customer.

20 Q Is that the only one you can remember?

21 A A specific instance, yes. But there were -- I'm
22 sure there were more. It was a frequent occurrence.

23 Q But sitting here today, you can't recall any other
24 specific incident you can tell us about; correct?

25 A No, not with detail.

DANA JUUL - CROSS

1 Q Now, if you received a customer complaint about a
2 product count, then the process of Bio-Systems under
3 Mr. Peacock was to retest the sample; correct?

4 A Which sample? I'm sorry. The retained?

5 Q Correct. The retained sample.

6 A I believe so, yes.

7 Q And you recall an instance where Ecolo-Bio, one of
8 the customers, had a complaint about a product. Do you
9 recall that?

10 A Yes.

11 Q And in fact, the retained sample was tested and it
12 showed that it was not a problem of Bio-Systems' count;
13 correct?

14 A Right, with the spiral.

15 Q And you can't recall any customer leaving
16 Bio-Systems due to a quality issue; correct?

17 A No, I did not.

18 Q Because that would have been something that you
19 would remember; right?

20 A Yes. I don't remember specific customers.

21 Q Okay. Do you recall any customers leaving as a
22 result of a quality issue?

23 A None of -- none of mine.

24 Q Do you recall any customers of Bio-Systems leaving?

25 A Yes. I'm sorry. I take that back. I was thinking
DANA JUUL - CROSS

1 of -- no, I do not. I'm sorry.

2 Q You'll agree with me that the products Bio-Systems
3 sold worked for the application that they were sold for;
4 correct?

5 A Yes.

6 Q And are you familiar with a sort of marketing sheet
7 that Bio-Systems would provide to its customers that
8 described the plating and testing methods they used?

9 A Yes.

10 Q I'm going to show you what is Defendants' Exhibit
11 854. Do you recognize this document?

12 A Yes.

13 Q Is this that sort of marketing piece I just asked
14 you about?

15 A Yes, it is.

16 Q Was this a document that was provided to customers
17 upon request or when would a customer obtain this
18 document?

19 A They would receive this if they had questions on
20 our procedure or if it was a new customer. It was
21 information on what we did.

22 Q And there's also a back side; correct?

23 A Yes.

24 MS. TURKE: I move for the admission of Exhibit
25 854, please.

DANA JUUL - CROSS

1 THE COURT: Did you want to admit 763 as well?

2 MS. TURKE: Yes, please.

3 THE COURT: They are admitted.

4 BY MS. TURKE:

5 Q Now, Ms. Juul, you're familiar with Bio-Systems'
6 ISO procedure for customer complaints; correct?

7 A Yes.

8 Q So when you talked earlier with your attorney, you
9 may not have seen some of the ISO procedures, but you
10 did see some others?

11 A Yes. I -- the corrective action that we did, I
12 guess I wasn't thinking of it as an ISO procedure. But
13 yes, I was aware of that.

14 Q And sometimes you did not follow the procedure for
15 customer complaints, is that accurate?

16 A Yes.

17 Q You got busy --

18 A Yes.

19 Q -- right? And like some procedures, they just
20 didn't get followed; correct?

21 A Not 100 percent of the time.

22 Q Now, you had access and the ability to talk to
23 Betco employees after Betco acquired Bio-Systems; right?

24 A Yes.

25 Q And you did not fear being fired if you talked to
DANA JUUL - CROSS

1 Ms. Lennard rather than directing her to Mr. Peacock;
2 right?

3 A I didn't think I would be immediately fired, no.

4 Q Because you had worked with Mr. Peacock for quite
5 awhile; correct?

6 A Yes.

7 Q And you had a good working relationship with him;
8 right?

9 A It was good, yes.

10 Q And the only thing Mr. Peacock told you about
11 communications with Betco was that if Ms. Lennard
12 called, that it should go through Mr. Peacock; right?

13 A Right. Direct the calls to him.

14 Q But you spoke freely with Mr. Kurt Bischoff;
15 correct?

16 A Yes.

17 Q And you spoke frequently with John Henson from
18 Betco?

19 A Yes.

20 MS. TURKE: I have nothing further. Thank you.

21 THE COURT: All right. Redirect.

22 MS. GEHRIG: Thank you, Your Honor. (4:52 p.m.)

23 REDIRECT EXAMINATION

24 BY MS. GEHRIG:

25 Q Ma'am, have you known Mr. Peacock since childhood?
DANA JUUL - REDIRECT

1 A Yes.

2 Q And you worked with him in a company that he
3 originally owned in the year 2000?

4 A 2001.

5 Q 2001. And Ma'am, have you observed his management
6 style -- did you observe his management style over the
7 years? Did you have significant contact with him from
8 the year 2000 to September 2010?

9 A Yes.

10 Q Did you see him fire other people?

11 A Yes.

12 Q Did you have any concerns about disagreeing with
13 Mr. Peacock in the workplace?

14 A It was not encouraged.

15 Q And did you observe other people lose their
16 positions because they disagreed with him?

17 A I believe so, yes.

18 Q Ma'am, you were shown a document that, I guess just
19 to summarize, purported to summarize procedures. I
20 believe you described them as original procedures?

21 A Yes.

22 Q Could you tell me, number one, had you ever seen
23 the document that was actually shown to you today? Do
24 you ever recall seeing that document?

25 A I don't recall this specific document, no.

DANA JUUL - REDIRECT

1 Q Do you have any idea where it came from, that
2 particular document?

3 A I can only assume that Malcolm would have generated
4 it or Marilyn or someone.

5 Q Now, Ma'am, I want to understand just to be clear
6 when these original instructions came out that you --
7 that were described in the sheet you looked at today?

8 A The instructions for C of A in there I was
9 originally told when I first started back in 2001/2002
10 is when I started doing C of As.

11 Q In 2001 and 2002 were you given one set of
12 instructions?

13 A Yes.

14 Q And what was that set of instructions?

15 A That was to refer to that spreadsheet and the raw
16 materials were entered in for a mix and their count was
17 entered, and then the spreadsheet would generate the
18 count from 48 hours and you would refer to that, that
19 number, and use that for your C of A.

20 Q Was that referred to -- what was that referred to?

21 A That was a theoretical count.

22 Q Okay. So the original procedure that you recall,
23 the first one that you were taught was to go to a
24 spreadsheet?

25 A Go to the spreadsheet and you would go down -- it
DANA JUUL - REDIRECT

1 was the second column down at the bottom was the 48-hour
2 theoretical, and you would pull that to insert it into
3 the certificate.

4 Q Okay. And so your understanding of that procedure,
5 was that a final product test result or was it an
6 extrapolation?

7 A It was an extrapolation.

8 Q And when did -- and I believe you stated that
9 Mr. Peacock spoke to you after that initial procedure
10 was set?

11 A Yes.

12 Q And was that the conversation -- I don't want to be
13 repetitive. Is that the conversation that you described
14 earlier in your testimony?

15 A Yes.

16 Q Okay. And from that day forward, did you refer to
17 any form of test results?

18 A No.

19 Q And again, just to make sure that I'm understanding
20 clearly, approximately what time frame was that that the
21 change was made?

22 A 2006/2007.

23 Q And Ma'am, you stated that you did read portions of
24 the ISO Manual?

25 A Yes.

DANA JUUL - REDIRECT

1 Q Did Malcolm Peacock direct you to do that?

2 A No.

3 Q Did anyone in a management position supervising you
4 ever direct you to any portion of the ISO Manual?

5 A No.

6 Q Were you referred to the ISO Manual in reference to
7 your C of A duties?

8 A No.

9 MS. GEHRIG: Thank you, Ma'am.

10 THE COURT: Thank you. You may step down then.
11 Plaintiffs may call their next witness.

12 (Witness excused)

13 MS. GEHRIG: Thank you, Your Honor. I will
14 tell the Court that this witness, I think, is going to
15 take longer than the previous three. But we'll go as
16 long obviously as the Court wants to go.

17 THE COURT: We've got plenty of time.

18 MS. GEHRIG: Very good. Thank you, Your Honor.
19 Mr. Kennedy.

20 THE COURT: Again, if you would stand before
21 the court reporter to be sworn.

22 **KEITH KENNEDY, PLAINTIFF'S WITNESS, SWORN,**

23 THE COURT: You may proceed.

24 MS. GEHRIG: Thank you, Your Honor.

25
DANA JUUL - REDIRECT

DIRECT EXAMINATION

1
2 Q Mr. Kennedy, would you please state your full name
3 and spell your last.

4 A My name is Keith William Kennedy. K-e-n-n-e-d-y.

5 Q Where do you currently reside?

6 A Spencer, Ohio.

7 Q Is that near Akron?

8 A Yes.

9 Q And where are you employed?

10 A Bio-Systems International.

11 Q Sir, Bio-Systems is in Beloit, Wisconsin?

12 A Correct.

13 Q How do you allocate your time between home and
14 Beloit, Wisconsin?

15 A I spend between two to three weeks per month here,
16 roughly one week in front of customers, and then the
17 balance of my time would be at home working from my home
18 office.

19 Q And sir, what technically is your title or position
20 with Bio-Systems?

21 A I'm the vice president and I have responsibility
22 for sales, marketing research, and operations.

23 Q Would it be fair to call you a *de facto* general
24 manager?

25 A Sure.

KEITH KENNEDY - DIRECT

1 Q How long have you been with the company?

2 A It will be three years in October.

3 Q How were you initially introduced to the company?

4 A Through a common acquaintance. Someone that used
5 to work for Betco introduced me.

6 Q What time period was that?

7 A This would have been 2011, third quarter of 2011.

8 Q Sir, what was your employment situation at the time
9 you were first introduced?

10 A I was currently -- at that time I was employed by
11 Diversity, which was acquired by a company called Sealed
12 Air, and they were sorting through the acquisition
13 integration, sorting out who had a job and who didn't.
14 So at that time I declined to develop an idea of working
15 for Betco to wait to see what happened to the
16 integration.

17 Q And sir, what brought you back to Betco?

18 A They decided they didn't want to do wastewater and
19 so the team was let go and I called Betco back and said
20 let's talk.

21 Q And sir, Betco has owned the company Bio-Systems
22 since you became introduced to them; is that right?

23 A Correct.

24 Q With whom did you interview in 2011, and I guess
25 again in 2012?

KEITH KENNEDY - DIRECT

1 A Denise Lennard and Paul Betz.

2 Q In connection with your interviews, did you
3 research the Beloit plant's history?

4 A Yes.

5 Q You were aware of the transfer of ownership?

6 A Yes.

7 Q And sir, were you aware kind of the circumstances,
8 that the previous owner remained an on-site manager --

9 A Yes.

10 Q -- for a period of time? Had you ever met -- did
11 you ever meet Mr. Peacock in connection with these
12 contacts with Betco?

13 A No.

14 Q Did you also research exactly what type of products
15 were being manufactured in the Beloit plant?

16 A I had a pretty good idea, yes, through their
17 website mostly.

18 Q And what did you understand that they were doing
19 and producing in the Beloit plant?

20 A Live culture bacteria for bioaugmentation or
21 biomediation and wastewater and some janitorial
22 applications.

23 Q And sir, what did you understand the role that you
24 were interviewing for in Bio-Systems?

25 A Well, in general to grow sales and profitability,
KEITH KENNEDY - DIRECT

1 you know, top line. But it was also made clear that
2 there were some issues that they wanted me to sort
3 through.

4 Q What is your understanding -- did you have a
5 general understanding of the issues before you accepted
6 the position?

7 A I did.

8 Q And what was your general understanding of the
9 issues?

10 A Concerns about the viability of the wet-batch
11 process, and in general, the plant being able to produce
12 enough bacteria to meet the business requirements. And
13 some concerns about the counting method, although that
14 didn't really gel up until after the fact. It was very
15 clear upfront that there were concerns regarding plant
16 capacity and the wet-batch process that actually had
17 turned into a lawsuit.

18 Q Sir, did you learn more soon after you started?

19 A Sure.

20 Q I'd like to -- what is your education?

21 A I hold a bachelor's degree in metallurgical
22 engineering from the University of Pittsburgh 1982 and a
23 master's degree in material science engineering three
24 years later.

25 Q And sir, just to facilitate your discussion of your
KEITH KENNEDY - DIRECT

1 professional experience, I'm going to refer you to a CV
2 that you prepared. Sir, does this describe your
3 professional experience?

4 A It does.

5 Q And including your work most recently at
6 Bio-Systems?

7 A Yes.

8 Q And immediately prior to Bio-Systems what was your
9 area of expertise?

10 A My career roughly split between -- 50/50 between
11 research and marketing or business management, and as
12 far as the industries, roughly split between cleaning
13 and sanitation and industrial and wastewater management
14 or municipal wastewater management.

15 Q What in your -- the history of your employment,
16 your professional experience, suits you for the position
17 that you took at Bio-Systems?

18 A The overarching umbrella is water management.
19 Water management as a discipline requires an in-depth
20 understanding of corrosion, deposit analysis, and
21 microbiological processes, whether they be beneficial or
22 detrimental.

23 Q And sir, in your previous work experience had you
24 supervised microbiologists?

25 A I have.

KEITH KENNEDY - DIRECT

1 Q Have you supervised quality control lab personnel?

2 A Not directly. Indirectly.

3 Q Do you understand the processes involved in testing
4 bacteria?

5 A I do.

6 Q And do you understand contamination?

7 A Sure.

8 Q How does that relate to wastewater treatment?

9 A Well, the bacteria that are selected for
10 bioaugmentation or selected based on their ability to
11 produce certain enzymes, depending on the substrate that
12 you're going after, had relatively high rates, and those
13 target organisms are desired because they are better at
14 producing the enzymes we need for wastewater treatment.

15 Contaminant organisms may or may not produce those
16 enzymes at the same rate, so it's preferred to focus on
17 target organisms and to differentiate between
18 contamination and target.

19 Q And sir, who had been functioning as the general
20 manager of Bio-Ohio or Bio-Systems before you accepted
21 the position?

22 A John Yazek.

23 Q And was your understanding that that was the person
24 who was hired in 2011 when you were unable to consider
25 the position?

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1 A Correct.

2 Q How did your qualifications set you apart from
3 Mr. Yazek?

4 A Well, I don't know the gentleman personally, but my
5 understanding is that I've spent more time in an R&D
6 role studying functions, mechanisms, new product
7 development as opposed to sales.

8 Q And sir, do you believe in a scientific method to
9 problem solve?

10 A Yes, I do.

11 Q Did you take that approach to your new position at
12 Bio-Ohio?

13 A Yes, I have.

14 Q Sir, immediately after you joined Bio-Systems, did
15 you become aware of an issue with certificates of
16 analysis?

17 A I did.

18 Q And what is your understanding of certificates of
19 analysis as they're -- as they were being used in the
20 Beloit plant?

21 MR. BIANCHI: Objection. Cumulative, Judge.
22 I'm not sure what --

23 THE COURT: I'll overrule the objection. You
24 may answer.

25 THE WITNESS: Certificates of analysis are used
KEITH KENNEDY - DIRECT

1 to document the quality or the content of specific lots
2 for specific products to a specific customer.

3 BY MS. GEHRIG:

4 Q And what was the problem?

5 A They were not being generated based on data, they
6 were being generated based on whatever it was last time;
7 make it a little different this time.

8 Q And what did you do to remedy the situation?

9 A We transferred the function of CoA generation from
10 the sales office over to the quality control manager and
11 issued a policy where we required testing of every
12 finished product prior to shipment, including those that
13 were associated with certificates of analysis.

14 Q And sir, do you -- are C of As, are they retained,
15 or are -- were you aware of a prior process where they
16 were saved over?

17 A Yes.

18 Q What's the process now?

19 A Pull up the last one, adjust the information that's
20 been previously described, put in a new result, and
21 issue.

22 Q And that was the old process?

23 A Yes.

24 Q Okay. Now are they saved independent?

25 A Oh, sure. Yeah. Now, yes, each lot is tested
KEITH KENNEDY - DIRECT

1 individually; a CoA is generated, and they're stored in
2 a file that Mindy Walters maintains, a database that she
3 maintains.

4 Q Sir, did you become aware of a problem with
5 products not being tested?

6 A Yes.

7 Q And with untested products being shipped?

8 A Yes.

9 Q And what is your understanding of products that
10 were not being tested at the time that you came on
11 board?

12 A That we were testing most of our powders, perhaps
13 all of our powders, sometimes before, sometimes after
14 the product was shipped. That the liquid is not being
15 tested. And that solids were not being tested.

16 Q And sir, what is your understanding of how that
17 situation arose?

18 A Well, you know, some of it is before my time. I
19 think that there's been testimony here today that the
20 liquids were tested off --

21 THE COURT: You don't need to repeat that. You
22 should testify from your own knowledge.

23 And you can ask your next question.

24 MS. GEHRIG: Thank you.

25 BY MS. GEHRIG:

KEITH KENNEDY - DIRECT

1 Q Sir, did you become aware of an issue with product
2 literature?

3 A Yes.

4 Q And what was the issue?

5 A That the product literature did not always
6 accurately reflect what was in the product or how the
7 product performed.

8 Q What types of literature were being used at
9 Bio-Ohio when you began in October of 2012?

10 A Product data sheets, product labels, and a few case
11 histories.

12 MS. GEHRIG: I will ask that Exhibits 23, 24
13 and 25, which have been described by the sales
14 representatives who had access to those documents, be
15 admitted.

16 THE COURT: I'll reserve on 23, 24 and 25 and
17 we can address it at a break.

18 MS. GEHRIG: Thank you, Your Honor.

19 BY MS. GEHRIG:

20 Q In October of 23, did you do anything to review the
21 documents that were stored at Bio-Systems?

22 A October of?

23 Q Did you review the documents?

24 A Yes.

25 Q And what time period?

KEITH KENNEDY - DIRECT

1 A October of '13.

2 Q 2013?

3 A 2013. Yes.

4 Q Sorry. It's that time of the day.

5 A Summer of 2013, yes. I'm sorry.

6 Q Okay. And sir, did you -- how many -- if we could
7 bring up Exhibit 13. Sir, do you see a document in
8 front of you?

9 A I do.

10 Q Does this document assist you in summarizing the
11 work that you did?

12 A It does.

13 Q And does this front page of the document refresh
14 your memory as to how many data sheets you reviewed?

15 A Yes.

16 Q How many?

17 A Approximately 1,654 data sheets, 4,800 labels.

18 Q Okay. And sir, what, if anything, did you find
19 regarding total plate count representations on data
20 sheets?

21 A We found that 57 percent of the labels contain a
22 reference to total plate count.

23 Q And sir, is that the data sheets or the labels?

24 A I'm sorry, I misspoke. It's the data sheets that
25 are 57 percent. 32 percent of the labels cited total

KEITH KENNEDY - DIRECT

1 plate count.

2 Q And sir, did you personally or did you and your
3 staff go through and mark up all of these?

4 A My staff and I printed them all off of the T drive
5 and reviewed them for various issues, including total
6 plate count.

7 Q And sir, when you reviewed these records, did you
8 make a visible notation on the face of the document
9 showing what was wrong with the record?

10 A We did.

11 Q And sir, if we could go to Exhibit 23. 83248. And
12 sir, do you see a document -- is that the first page?
13 Do you see a document in front of you?

14 A Yes.

15 Q And is this one of the documents that you and your
16 staff reviewed?

17 A It is.

18 Q Could you -- did you visibly indicate on here what
19 was wrong with this document?

20 A It's highlighted plate count --

21 THE COURT: If one of you could just remove
22 that arrow. It's been sitting there forever. Lower
23 left-hand corner. Thank you. I'm sorry, you can answer
24 the question of your counsel.

25 THE WITNESS: Yes, the plate count of 5 billion
KEITH KENNEDY - DIRECT

1 per gram is highlighted in blue.

2 BY MS. GEHRIG:

3 Q Okay. And if we could go to 83394, also from
4 Exhibit 23. I'm sorry. You were paging through,
5 weren't you? Okay. On this document, could you -- this
6 is 83252. Could you indicate what was wrong with this
7 document?

8 A Plate count is listed as 3.5 billion per gram.

9 THE COURT: And you know it's wrong because?

10 THE WITNESS: Because the ProtoCOL counter
11 introduced a bias for essentially every product that we
12 ship. So if the --

13 THE COURT: No. But you're saying based on
14 what you were told was the practice at the time, you're
15 assuming it wasn't accurate.

16 THE WITNESS: Based on the work that I've done
17 subsequently, I believe that if it lists plate count,
18 that it's incorrect based on what I've learned about the
19 ProtoCOL counter.

20 THE COURT: All right. You can ask the next
21 question.

22 MS. GEHRIG: Thank you, Your Honor. And the
23 next sheet, did we skip one? Have we looked at 83394?
24 After all that, I got the number wrong.

25 BY MS. GEHRIG:

KEITH KENNEDY - DIRECT

1 Q Sir, in addition to plate count claims, what other
2 areas were you looking for on the data sheets?

3 A Well, during the course of the review we also
4 picked up and eventually corrected a number of other
5 issues regarding, for example, claims that our product
6 control eliminated or reduced filamentous bacteria
7 and/or algae. This was an issue because our EPA
8 regulations require a data set and a primary
9 registration to make such a claim. So we noted those.

10 Q And could you turn to 86051, please.

11 THE COURT: It's unlikely I'm going to be
12 admitting 23, 24 and 25, so if you want to just go to
13 what his results were, that might be more effective.

14 MS. GEHRIG: Excellent. Thank you.

15 THE COURT: I haven't heard an objection on
16 1006 grounds, so I'm assuming that they'll be admitted
17 on that basis. If not, we can revisit the specific
18 examples.

19 MS. GEHRIG: Thank you.

20 BY MS. GEHRIG:

21 Q Go back to 13, please. Okay. So sir, the first
22 page of this, the literature review discusses the plate
23 count claims; is that correct?

24 A Correct, yes.

25 Q Could you turn to the second page, please.

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1 MR. BIANCHI: Your Honor, I object to this
2 document. It was coming. I don't object to 3A, but
3 this one I believe runs in line with the argument that
4 we have that there's no cited documents showing how he
5 determined what he did. This is --

6 THE COURT: I'm with you now. It appears that
7 my means of speeding things up may not succeed. If you
8 want to lay a foundation as to what he did in 3B, well
9 then we'll have to address them individually.

10 MS. GEHRIG: All right. Thank you.

11 BY MS. GEHRIG:

12 Q Sir, with regard to -- is this 3B?

13 THE COURT: This is 3B.

14 Q With regard to what you did to compile the data
15 contained in 3B, could you describe what you did?

16 A Yes. We reviewed the product data sheets to look
17 for misrepresentation in these buckets: Plate count
18 claim, performance, strain identification, shelf life,
19 pathogen certification. And when we found
20 discrepancies, we circled them and noted them.

21 Q And sir, for each category does it state the number
22 that you identified with the issue?

23 A It does.

24 Q And a percentage of the total?

25 A Yes.

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1 Q For the 1,157 data sheets that you reviewed?

2 A Yes.

3 Q And all of those documents were compiled with the
4 circled information identified on sheets which were
5 provided and which are included in Exhibit No. 23?

6 A Correct.

7 THE COURT: What does the 70 percent represent?
8 Is that the cumulative --

9 THE WITNESS: 70 percent is the percent of data
10 sheets that required revision of some sort.

11 THE COURT: And there's no double counting
12 between those percentages?

13 THE WITNESS: We tried our best. It's a big
14 pile. We actually alphabetize them to ensure that that
15 was avoided.

16 THE COURT: All right. And I understand
17 obviously what plate count claims are. What's
18 inaccurate performance claims? I think you've already
19 described those as well generally. So how did you
20 determine that they were inaccurate? Let's take
21 hydrogen sulfide.

22 THE WITNESS: Hydrogen sulfide. Okay. That's
23 basically largely based on my personal experience in the
24 field. Hydrogen sulfide can be reduced by the chemistry
25 that's in Bio-Systems' products. It's a question of

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1 degree however. The amounts of the particular raw
2 materials were so minute compared to the amount of water
3 being treated, I didn't consider it to be an accurate
4 representation of product performance.

5 THE COURT: And that's the same with respect to
6 these other statements under inaccurate performance
7 claims?

8 THE WITNESS: The filamentous algae control,
9 pathogen control are examples of EPA label violations.
10 Cold weather --

11 THE COURT: EPA label violations in the sense
12 that the EPA won't let you make that claim or that it
13 overstates it?

14 THE WITNESS: That you're not permitted to make
15 the claim.

16 THE COURT: All right. And the cold weather.

17 THE WITNESS: The inference on the data sheet
18 was that they were quote/unquote cold weather bugs in
19 the product, and in fact, the formulas were identical to
20 summer or warm weather bugs.

21 THE COURT: And pathogen control?

22 THE WITNESS: Pathogen control is another
23 reference to EPA violation. If you have a product
24 that --

25 THE COURT: All right. I missed something
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1 then. I thought it was filamentous control? That's
2 not --

3 THE WITNESS: That's another example.

4 THE COURT: That's EPA?

5 THE WITNESS: Yes, sir.

6 THE COURT: And agent control, EPA or not? I
7 thought you mentioned two. It sounds like you're saying
8 three now.

9 THE WITNESS: There are three. I forgot about
10 path -- filamentous bacteria, algae control, and
11 pathogen control.

12 THE COURT: In your opinion overstate or
13 conflict with EPA restrictions.

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: All right. I'm with you.
16 Incorrect strain ID?

17 THE WITNESS: If the label says there are 14
18 strains and there are 4, if the product data sheet says
19 that there are Pseudomonad strains that are not viable
20 or even in the product to begin with, that would be
21 another example.

22 THE COURT: And you made that determination
23 yourself.

24 THE WITNESS: Yes. We valued -- I pull it up
25 and --

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1 THE COURT: When you say *we*, that sounds like
2 others were involved in the process.

3 THE WITNESS: Yes.

4 THE COURT: So on what basis were they
5 instructed to count or not count?

6 THE WITNESS: The team that was working for me
7 primarily was looking for the hydrogen sulfide and plate
8 count claims. Whenever they had concerns about the
9 other issues, they kicked back to me and I reviewed the
10 formula.

11 THE COURT: So in the case of incorrect strain
12 ID, you would have looked at each of these?

13 THE WITNESS: Yes.

14 THE COURT: And you were able to determine that
15 they were incorrect how?

16 THE WITNESS: By comparing the product data
17 sheet to the formula; to the mix sheet, to the recipe.

18 THE COURT: Shelf-life claims, is that
19 something you did personally as well?

20 THE WITNESS: The issue there was that
21 shelf-life claims for a product that just contained
22 vegetative cells, the Pseudomonads would be seriously
23 overstated. I believe that the shelf-life claims are
24 correct regarding the Bacillus spores, but not for
25 vegetative.

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1 THE COURT: So you instructed someone to find
2 every place where there was a vegetative claim.

3 THE WITNESS: Correct.

4 THE COURT: Incorrect pathogen certification.
5 Is that the EPA issue or is that something --

6 THE WITNESS: No, sir. The pathogens that we
7 test for are salmonella and shigella. We had a number
8 of data sheets that referenced e-coli certification,
9 which was not being done. Those are all examples of
10 pathogens.

11 THE COURT: Any more questions with regard to
12 this document?

13 MS. GEHRIG: No, Your Honor. I move for its
14 admission.

15 THE COURT: I will reserve on its admission
16 until the defendant has an opportunity to cross-examine.
17 You should proceed.

18 MS. GEHRIG: Thank you. Next page, please.

19 THE COURT: I will admit 3A, however.

20 BY MS. GEHRIG:

21 Q Sir, with regard to page three of the literature
22 review, could you describe what you were looking at
23 that's summarized on this document?

24 A It's a similar process to what I just described for
25 data sheets, only now we're looking at the product

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1 labels, the labels that's affixed to the package on
2 shipping.

3 Q And sir, you looked at 47 -- you and your staff
4 looked at 4,793 product labels?

5 A Correct.

6 Q And based on your review of those labels, you
7 filled in the data in this sheet?

8 A Correct.

9 Q With regard to plate count claims, is that a
10 similar type of analysis that you've just described for
11 the Court?

12 A It is.

13 Q And your result in that was?

14 A About 32 percent of our labels had plate count
15 claims.

16 Q And again, sir, with regard to the next category,
17 performance claims that are inaccurate or violate
18 regulatory requirements, is that the same type of
19 analysis you just described for the Court?

20 A It is.

21 Q Same process is followed?

22 A Same criteria, yes.

23 Q And sir, you found 19.8 percent deviation?

24 A Correct.

25 Q Incorrect strain identification. Is that the same
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1 process you just identified for the Court?

2 A It is.

3 Q And what percentage of total was a problem?

4 A 3.2.

5 Q Sir, what's the green-aware logo?

6 A Green-aware logo, as I understand it, is a
7 self-certification process that was created by
8 Bio-Systems in -- as an answer to or as a similar
9 certification for green seal or the environmental
10 businesses answer to Good Housekeeping seal of approval.
11 There's a set of criteria that can be used to determine
12 if something is green or not, and this green-aware logo
13 was the Bio-Systems' answer to those other programs.

14 Q Are you aware of any independent review outside of
15 Bio-Systems that made them eligible to certify that they
16 were green aware?

17 A I am not.

18 Q And why is that inappropriate?

19 A Without the certification, it doesn't really mean a
20 whole lot.

21 Q Did you think that that was any form of a
22 misrepresentation?

23 A I did. Without understanding what was behind it or
24 whatever kind of testing would have supported the claim,
25 we felt it best to remove it.

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1 Q And that was what percentage?

2 A 8.7.

3 MS. GEHRIG: And Your Honor, again I'll move to
4 admit.

5 THE COURT: And I will reserve on the same
6 basis. You may proceed.

7 MS. GEHRIG: Thank you.

8 BY MS. GEHRIG:

9 Q Sir, did you become aware of production issues?

10 A Yes.

11 Q And what was the concern?

12 A Concern was that the wet-batch process was not
13 fundamentally viable; that it wasn't able to increase
14 plate count while the material was drying on the racks.

15 Q And sir, was there a particular specification,
16 bacteria count specification that you were focused on?

17 A A wide variety of our products shipped at 5 billion
18 CFU per gram specification and so the concern is if the
19 wet-batch process isn't higher than that, you can't use
20 it as a raw material to dilute back down to 5 billion.

21 Q And sir, what was the total amount of production
22 affected by this concern?

23 A All of our powders, which I estimated about 70
24 percent of the business.

25 Q And sir, have you seen what's been marked and
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1 admitted as Exhibit 4?

2 A I have.

3 Q And were you aware of the concerns that are voiced
4 in this email?

5 A I was.

6 Q Exhibit 6. Sir, were you aware of attempts to make
7 the wet-batch product work in the Beloit plant --

8 A Yes.

9 Q -- subsequent to the acquisition and subsequent to
10 Mr. Peacock's departure?

11 A Yes.

12 Q And who participated in those efforts?

13 A Well, looks like Neil Seeger and Derek Loverich
14 were on point for that.

15 Q Okay. And sir, when you came on board, what was
16 the status of their attempts to make the wet-batch
17 process work in the Beloit plant?

18 A Unsuccessful.

19 Q Sir, in September and October of 2013, did you
20 attempt to gather your own data to determine whether the
21 wet-batch process could possibly work in the Beloit
22 plant?

23 A I did.

24 Q What did you pull your data from?

25 A We generated a series of experiments using the same
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1 exact process that the plant used for production. So we
2 made a typical production and we reserved one of the
3 trays for R&D sampling. We would sell the other trays
4 as it became available, but we set one aside to just
5 test total plate count as a function of time so that we
6 could accurately duplicate what the plant was doing.

7 Q Did you have Ms. Walters test that product?

8 A I did.

9 Q Did she test it in one stage or multiple stages?

10 A She tested periodically over the course of the four
11 weeks.

12 Q And sir, are you familiar with the Exhibit -- it's
13 -- we've designated it 12, but it appears to be 2A on
14 this screen in front of you.

15 A I am.

16 Q And sir, what did you do to formulate or to create
17 the data that's graphed on this picture?

18 A Okay. All of these samples were taken from one of
19 the trays, the cardboard trays with the powder on it.
20 And we tested total plate count periodically over four
21 months to see how that sample, how that tray, how that
22 intermediate product behaved over time.

23 Q Sir, I can't pronounce the names of these bacteria.
24 What is this bacteria?

25 A This is Bacillus licheniformis.
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1 Q Thank you, sir. Why did you -- was this the
2 bacteria that you tested in this?

3 A It's one of two, and we selected it because it's a
4 high volume Bacillus strain for us.

5 Q Sir, what does this summary of data show?

6 A Shows me that after the fermentate is mixed with
7 the substrate, the grains or the media, there is an
8 increase in total plate count. It does not resolve
9 between contaminants and target, but it does show an
10 increase and that that increase then subsequently
11 returns back to baseline after seven to ten days.

12 Q And sir, the process -- is the process still in a
13 wet form or is it in a dry form at the time that we see
14 the peak?

15 A It's going to be some place in the middle. I would
16 expect there would still be some moisture in there. The
17 incubation process requires a slow drying, so the room
18 is warm, it's humidified and so it doesn't dry quickly.
19 My guess is that there's still some moisture in the
20 sample at that peak.

21 Q And so, sir, how much time is required to get the
22 product from where it's tested at that intermediate
23 stage to when it's ready for production?

24 A It can be used in production pretty much any time
25 after it gets close to being dry seven to ten days.

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1 Q Does your graph illustrate where the product would
2 be and its testing result in seven to ten days after the
3 peak?

4 A It's going to be pretty close to back down to
5 baseline. It's going to be after the peak.

6 Q And --

7 THE COURT: How many different results does
8 this graph represent? Is this just one sample?

9 THE WITNESS: This is one experimental batch
10 sample. Frequently each dot is a different sample on a
11 different date.

12 THE COURT: How many of these did you run?

13 THE WITNESS: We ran them on two different
14 strains.

15 THE COURT: So twice.

16 THE WITNESS: Correct.

17 BY MS. GEHRIG:

18 Q And sir, what is depicted on page two?

19 A This is the same data as presented on page one, but
20 I've summarized performance by week to simply
21 demonstrate mostly the value of this presentation is to
22 compare the 136 to the 214. So the fermentate plus the
23 grain or media or substrate at the start gives kind of
24 136 million CFU per gram. And after the process was
25 mature at week four, it only went up to 214. What we

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1 were looking for would be over 5,000.

2 Q So sir, at its highest peak did this product meet
3 spec at the 5-billion count?

4 A If you can back up one slide, please. The peak was
5 just a little bit under 5 billion on the single data
6 point in order to do the weekly averages that comes back
7 down. But that shows the highest that we got was almost
8 5 billion. You could call it 5 billion for all intents
9 and purposes.

10 Q And sir, you said you performed this same
11 experiment for a second strain?

12 A Correct. *Bacillus subtilis*. Same experiment, same
13 environment, same conditions, just a different strain.

14 Q And sir, why did you pick this second strain?

15 A Also a large volume strain for our product line.

16 Q And sir, can you describe the results of the study
17 depicted visually on the graph?

18 A It's very similar to the licheniformis. There was
19 an initial plate count and then it increased. After
20 about a week, it started to decrease and by the end of
21 say 10, 11 days, it was back to where we started.

22 Q And sir, if we're talking again about the 5-billion
23 count, did this experiment get close to the 5-billion
24 count?

25 A This one peaked at three. Just a hair under 3.0
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1 times 10 to the 9th would be just slightly shy of 3
2 billion.

3 Q And the last page, please. And sir, what is
4 summarized on Exhibit 2B?

5 A Again, just a distillation of the previous graph
6 showing -- the table is actually more interesting
7 because it shows that we started at 40 million, we ended
8 up at 250 million, 254 million, whereas we were aiming
9 at 5,000 or higher.

10 Q Thank you, sir.

11 MS. GEHRIG: I'll move to admit Exhibit 12.

12 MR. BIANCHI: Same objection.

13 THE COURT: I will reserve on the same basis.

14 BY MS. GEHRIG:

15 Q Sir, what is the ProtoCOL counter?

16 A ProtoCOL counter is an electronic device that's
17 used to measure colony-forming units on an agar plate.

18 Q You were familiar with bacteria counting prior to
19 Bio-Systems?

20 A Correct.

21 Q Had you ever previously worked with a ProtoCOL
22 counter?

23 A No.

24 Q What was your understanding of the ProtoCOL
25 counter's intended use?

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1 A ProtoCOL counter is an example of a wide range of
2 devices that are used to do plate count quickly and
3 automatically to save the operator time or to improve
4 consistency from operator to operator or lab to lab,
5 batch to batch. Mostly they're time-saving devices and
6 they're also -- some of these devices give you an answer
7 more rapidly than 24 hours.

8 Q And sir, what is your understanding of the industry
9 standard for counting bacteria?

10 A All of these methods are compared to the manual
11 count plate method. The marketing literature for these
12 different devices always use manual plate count as kind
13 of the gold standard. So my new device works with these
14 different advantages, plus it correlates this way with
15 manual plate count.

16 Q Sir, were you alerted to any concerns about the
17 ProtoCOL counter when you began at Bio-Systems?

18 A I was.

19 Q And again, referring back to the email from
20 Mr. Seeger?

21 A Yes.

22 Q And sir, relating back to your concerns about
23 testing results generated at the Beloit plant, did you
24 have concerns that even when the product was tested, if
25 the ProtoCOL counter isn't functioning, was there an

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1 integrity problem?

2 A Yes. I had concerns.

3 Q Did you collect any data on your own to determine
4 whether the ProtoCOL counts being conducted on the
5 machine in the Beloit plant were similar or dissimilar
6 to manual counts?

7 A I did.

8 Q Sir, how did you collect the data?

9 A I worked with Mindy Walters and her team to collect
10 and analyze a series of 275 finished product samples --
11 excuse me -- 275 total that included some fermentate and
12 intermediate product. So where it says liquid powder
13 sold, those are our finished products.

14 So 275 duplicates. And what we were doing in each
15 case was using the ProtoCOL counter with our standard,
16 the test that we've always been running, side by side
17 with the manual plate count method.

18 Q And sir, did you test -- did you test one type of
19 material or did you test several types of material?

20 A We tested -- the forms are on the left:
21 Fermentate, intermediate product, liquid powder, and
22 solid.

23 Q Sir, is a fermentate a single strain or multiple
24 strains?

25 A Single strain.

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1 Q And how did the fermentate test out on the ProtoCOL
2 counter?

3 A We got an agreement of 1.126. And what that is is
4 the ratio of the plate count as determined by a manual
5 divided by the ratio as determined by the ProtoCOL
6 counter.

7 Q Is that within an acceptable range?

8 A It's basically a 12.6 variance. I consider that
9 acceptable, yeah.

10 Q Sir, the IP wet-batch powder, is that single strain
11 or multiple strain?

12 A Single strain.

13 Q And how did that do?

14 A 7.2 percent variance. The two methods agreed
15 within 7.2 percent.

16 Q And sir, your liquid, solid, and powder products
17 that you tested, were those single or multiple strain?

18 A Multiple strain.

19 Q And how did the liquids perform?

20 A The liquid ratio between manual and ProtoCOL showed
21 a .159. And what that means is that the manual --
22 excuse me. If the ProtoCOL counter said it was 100, the
23 manual said it was 15.9. So that's the ratio we're
24 looking at.

25 Q Okay. And with the powders?

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1 A Powders is a ratio of .334. So if the ProtoCOL
2 counts out 100, then the manual would have reported
3 33.4.

4 Q And finally with the solids.

5 A Same ratio. This time it's 8.3 out of 100.

6 Q And sir, relating back to the literature that you
7 reviewed, did this -- is this the basis upon examination
8 by the Court of your concern with the plate count
9 claims?

10 A It is.

11 Q Was it your understanding that the ProtoCOL counter
12 had been used to -- for testing in the Beloit lab at the
13 time that that literature was being distributed?

14 A Yes.

15 Q So sir, even if all of the products had been tested
16 at the time that they were manufactured and met spec on
17 the ProtoCOL counter, based on this analysis do you
18 believe that Bio-Systems had been selling what they
19 purported to be selling?

20 A I believe that this bias applied to every powder
21 that we -- every product that we sold.

22 Q And sir, did you try to take a snapshot in terms of
23 what that meant for the whole amount of bacteria that
24 Bio-Systems had been purporting to sell in a single
25 year?

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1 A I did.

2 Q And what year did you select?

3 A 2012.

4 Q And sir, could you describe the analysis?

5 A What we did was we looked at the -- we generated a
6 list of all 4,011 shipments that we made in 2012. We
7 had the product, we had the pounds shipped, and the
8 targets plate count based on the specification either
9 published or nonpublished.

10 We then applied the bias product-by-product,
11 form-by-form, and determined how many bacteria our
12 specification, internal or external, would require us to
13 have shipped. Then applied the bias to determine how
14 many bugs on average we actually shipped.

15 Q And sir, did you -- how does the term *the gap*, how
16 is that significant --

17 A The gap --

18 Q -- to this analysis?

19 A -- is the difference between what we said we were
20 shipping and what we actually shipped.

21 Q And what did you determine the gap in terms of
22 bacteria content or --

23 A That's the green/blue line. The required shipment
24 in 2012 was called 2300 quadrillion colony-forming units
25 for that year whereas we actually shipped 640 using that

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1 same metric.

2 Q And so the gap would be?

3 A 1,647. On a ratio basis it would be 641 over
4 2,288.

5 Q Sir, what did you do with that data to determine a
6 financial impact?

7 A Right. So that difference could be made up either
8 with capital improvement or with expense by buying
9 bacteria from the outside lab. If we -- this analysis
10 on 4C applies our purchase by price times the amount of
11 bacteria that we needed to purchase to cover that gap
12 between what we actually shipped and what we said we
13 were shipping and that number came out at about \$1.1
14 million using 2012 as a baseline.

15 Q And again, sir, this is assuming that all tested
16 products made spec?

17 A Correct.

18 Q All products were tested and all products which
19 were tested --

20 A Exactly met spec, right.

21 Q -- made spec. Okay. Sir, you have already
22 testified about some of your observations with regard to
23 the -- or some tests that you did with the ProtoCOL
24 counter. Did you observe independently a second -- did
25 you collect a second set of information regarding the

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1 ProtoCOL counter?

2 A I did.

3 Q And when did you do that?

4 A In May of 2015.

5 Q And sir, could you describe what you did?

6 A Yeah. I took a sample from our incubator, placed
7 it on the counter, rotated it a series of times, and got
8 different numbers.

9 Q And sir, did you take pictures of that analysis?

10 A I did.

11 Q And sir, could you describe what you did that is --
12 is this depicted on Exhibit -- proposed Exhibit 18?

13 A Yeah. This is just showing the screen printout.
14 So you place the agar plate in front of a video camera,
15 which takes an image. That image is analyzed by the
16 ProtoCOL counter and it produces a number, in this case
17 1.52 times 10 to the 9th.

18 Q And what was the next step in your process?

19 A I twisted the agar plate. It sits horizontally. I
20 twisted it about 20 degrees, just, you know, from twelve
21 o'clock to one o'clock, and hit the space bar again to
22 get another number from the same sample.

23 Q And will that show up on our next screen?

24 A Yes. And that time it was 3.73 times 10 to the
25 9th, so roughly twice as high.

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1 Q And twisting it again?

2 A I continued that all the way around the compass,
3 all the way around the clock for a total of 18 times
4 just to see what I could get, how wide was the range. I
5 had heard it was a big range, I just wanted to see, and
6 in fact, it was a range of 13.7 from the smallest number
7 reported by the ProtoCOL counter to the highest number
8 reported, had a range of 13.7. Specifically, the lowest
9 was 1.2 billion and the highest was 17 billion.

10 Q Sir, did you perceive this to be a problem?

11 A Absolutely. You know, as the guy managing the
12 business, it almost -- it tells me that this is
13 essentially a meaningless tool. Statistically we showed
14 the averages across a wide number of samples, but
15 day-to-day, I can't tell if I'm going, you know, 12
16 miles an hour or 170 miles an hour. It's that wide of a
17 range. It's not a viable tool.

18 Q Sir, did you also take a look at the literature
19 relating to the ProtoCOL counter which had been
20 distributed at Bio-Systems while the company was owned
21 or managed by Mr. Peacock?

22 A I did.

23 Q And sir, is this a copy of some of the literature?

24 A Yep.

25 Q And did you see any problems with the literature?

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1 A I did. You know, this is a marketing piece
2 designed to tout the benefits of the ProtoCOL counter
3 and the spiral plater, and there are some issues. It
4 says in the opening paragraph that the procedure for
5 this method should take 20 grams and mix it with 200
6 milliliters of water. Well, that doesn't happen.
7 That's not an accurate statement. I understand it.
8 It's a reference to the serial dilution demonstrated in
9 the video, but that's not what this says. This says you
10 put 20 grams of product into 53,000 gallons of water and
11 then plate that. Well, that's not what happens.

12 We have just previously shown that the ProtoCOL
13 counter is actually able to produce a wide variety of
14 results through a simple sample rotation without any
15 other complexities. Twisting the plate gives you a very
16 wide range of answers.

17 Q And any other issues?

18 A As I've stated before, I believe that manual plate
19 count is the industry standard based on my experience as
20 a micro lab manager.

21 Q And sir, is this the second page of the literature?

22 A Yes. This gets into the finer points of how long
23 it takes and how long it doesn't take and I believe that
24 the claims or the benefits for the ProtoCOL counter are
25 hyperbolic. There is some times savings to be sure.

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1 That's the basis on which the ProtoCOL is selling it,
2 but I think that the benefits are overstated.

3 Q Sir, did you have concerns about statements or
4 representations that had been made to Bio-Systems'
5 customers?

6 A Yes.

7 Q And did you believe that there were any affirmative
8 misrepresentations?

9 A Yes.

10 Q In what areas?

11 A Well, we had a number of customers who were testing
12 our products and finding out that we were light, that we
13 were under plate count.

14 Q And sir, did you try to reach out to customers to
15 address some of these issues?

16 A Certainly. In some cases we brought it to their
17 attention; in some cases they brought it to our
18 attention. In each case, we sorted out, you know, could
19 we afford to just make up the difference and eat the
20 cost or did we have to have a price discussion.

21 Q And had anyone started that process before you took
22 the position?

23 A Yes. Denise Lennard and some of the sales
24 managers.

25 Q And to approximately how many accounts had people
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1 reached out before you came on board?

2 A Probably five or six.

3 MR. BIANCHI: Objection. Hearsay.

4 THE COURT: Sustained.

5 BY MS. GEHRIG:

6 Q Was there a significant number of customers that
7 had not been contacted?

8 A Yes.

9 Q Approximately how many did you reach out to that
10 had not been contacted?

11 A I probably, over the course of the first year,
12 talked to 20 to 25 customers about this issue.

13 THE COURT: Counsel, while you're doing that,
14 it's hard to tell what exhibit you're dealing with.
15 You're not always identifying it for the record.

16 MS. GEHRIG: I apologize.

17 THE COURT: That's fine. I just want to make
18 sure. The wet-batch process I believe was Exhibit 12;
19 is that correct? We went from Exhibit 3A, 3B, and 3C to
20 12.

21 MS. GEHRIG: Your Honor, it's my fault because
22 I've been referring to them to the witness by the label
23 that appears on the screen.

24 THE COURT: You haven't always because you
25 referred to the wet-batch process as Exhibit 12. You
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1 didn't refer to it by the numbers in the top left-hand
2 corner. Then I think you referred to or meant to
3 Exhibit -- you did refer to Exhibit 4A, but I think you
4 meant to say 14.

5 MS. GEHRIG: That's correct, Judge.

6 THE COURT: All right. And then finally this
7 ProtoCOL orientation is 18; is that correct?

8 MS. GEHRIG: It is 18, Your Honor.

9 THE COURT: Right. Okay. So I have those.
10 Now what are we calling up?

11 MS. GEHRIG: Your Honor, can I just go back one
12 more time to make sure I think we've got everything
13 right? I erroneously referred to 3A, B, and C when
14 that's Exhibit 13.

15 THE COURT: All right. I will note it as
16 Exhibit 13. Although that creates a problem for you
17 because 3A is admitted, but 3B and 3C are not. So right
18 now it's not really clear. Well, Exhibit 13 is out, so
19 you'll have to decide that.

20 But let's not waste time with this witness anymore.
21 Why don't you proceed.

22 MS. GEHRIG: Thank you, Your Honor.

23 THE COURT: And you are on Exhibit?

24 MS. GEHRIG: 15.

25 THE COURT: Thank you.
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1 MS. GEHRIG: Thank you, Judge.

2 BY MS. GEHRIG:

3 Q Sir, which customers did you reach -- is this a
4 summary of customers that you --

5 A This page is a summary, yes.

6 Q And sir, on this page which customers did you reach
7 out to?

8 A Well, in subsequent pages there's a list there.

9 Q If we could.

10 A I spoke with Chempace -- go ahead.

11 Q And sir, what was the issue with Chempace?

12 A Oh --

13 MR. BIANCHI: Objection. Hearsay.

14 THE COURT: Sustained.

15 BY MS. GEHRIG:

16 Q Sir, what --

17 A Altech Supply. Biological Solutions. Chemtreat.
18 Next page, Ecological Labs. Elhorn. Garrett Callahan.
19 In-pipe. MTEK. Rex-Bac-T. Orville Quante indirectly.
20 Tan Chee has been mentioned. Team Labs. And Zone
21 Solutions.

22 Q Sir, what was your goal in reaching out to these
23 clients?

24 A Conversations regarding plate count and potential
25 solutions. Some of these people were deposed, and after
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1 the deposition they had questions and so I would answer
2 those questions.

3 Q And what did the process of resolving any issues
4 that you encountered, what did that involve?

5 A Generally it was a discussion first of all to let
6 them --

7 MR. BIANCHI: Objection. Hearsay.

8 THE COURT: You can describe the general
9 discussion. You can't describe specific discussions
10 other than what would you generally do, not what
11 individual customers told you.

12 THE WITNESS: Okay. I would discuss with them
13 total plate count versus what they were receiving and
14 the content of their product versus the label, strain
15 identification, and so on.

16 BY MS. GEHRIG:

17 Q Did you have to make some adjustments to margins
18 and prices as a result of these conversations?

19 A For some of our customers, yes.

20 Q Did you lose any customers as a results of these
21 conversations?

22 A We lost a couple of customers and we conceded
23 margin on a couple of customers.

24 Q And sir, are the product of these discussions
25 summarized on the first page of Exhibit 18?

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1 A Um-hmm.

2 Q And sir, does the summary include both the issue
3 that you identified, the result, and the financial
4 impact?

5 A It does.

6 Q Sir, the certificate of analysis issue, has that
7 been resolved?

8 A Yes.

9 Q And did any changes need to occur to lead times for
10 product distribution to make that adjustment?

11 A Yes.

12 Q Could you describe?

13 A Generally we moved from three days to five days,
14 five business days lead time so that we had enough time
15 to make, test, and complete testing the product before
16 we shipped instead of doing it parallel.

17 Q And sir, relatedly have you adjusted lead time so
18 that all products can be tested?

19 A Yes.

20 Q And that the results -- could you describe what
21 lead time is required --

22 A Sure.

23 Q -- when you test in the manner that you're testing
24 now?

25 A When we receive an order, it's entered into our
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1 system. That shows up on the production schedule the
2 following day. Then it's either made that day or the
3 next day, and after it's completed, a sample is pulled
4 for QC testing. That process takes 24 to 36 hours. At
5 the end of that time, we're able to ship.

6 When you add that all up, depending on weekends and
7 whatnot, we end up with it being very difficult to ship
8 three days after receipt of order. We moved it to in
9 five days.

10 Q And sir, you described various issues with
11 labeling. Have those been adjusted --

12 A They have.

13 Q -- and fixed? You've described your contact with
14 the customers.

15 A Yes.

16 Q Sir, when you started work at Bio-Systems, how many
17 purchase bugs -- what percentage of bugs were purchased
18 for your products?

19 A Well, I would say maybe 25 percent of total
20 requirement. That's an estimate.

21 Q And has that increased or decreased since --

22 A It's increased significantly.

23 Q And sir, can you produce enough bugs in the Beloit
24 plant as it's equipped to meet your customers' demands?

25 A We cannot.

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1 Q What are you doing to deal with that?

2 A Well, I make that statement based on an analysis of
3 the current fermentors, what they're able to produce,
4 and assuming very generous operating conditions like
5 24/7, 365, no mistakes, relatively high fermentate
6 output. That still doesn't give us enough bacteria to
7 meet our current requirement at the current volumes and
8 current state of specification. I would say that
9 currently we're able to produce 10 to 15 percent of our
10 total requirement.

11 Q And so what do you do to bridge the gap between --

12 A We're purchasing --

13 THE REPORTER: I'm sorry.

14 THE COURT: I'm sorry, what you're doing is
15 you're jumping on top of her question and I should have
16 said something earlier and I apologize to our court
17 reporter. Wait until she finishes her question before
18 you answer. And believe me, if the court reporter had
19 to say something, it must be really bad because that
20 almost never happens. It's my fault for not warning you
21 before.

22 Would you please wait until the question is
23 completely asked.

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: You may ask your next question,
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1 Counsel.

2 MS. GEHRIG: Thank you, Your Honor.

3 BY MS. GEHRIG:

4 Q Sir, how are you bridging the gap?

5 A We're purchasing bacteria from a third party.

6 Q And sir, is that data that's provided to people
7 that do the finances for --

8 A It is.

9 Q -- Bio-Systems and Betco?

10 Sir, have you completely eliminated use of the
11 wet-batch process in the Beloit plant?

12 A We have.

13 Q And have you completely switched over from ProtoCOL
14 counting to manual bacteria counts?

15 A Yes.

16 Q And when did that occur?

17 A April/May of this year.

18 Q Thank you, sir.

19 MS. GEHRIG: Subject to issues with exhibits,
20 that's all I have at this time.

21 THE COURT: All right. With apologies,
22 Mr. Kennedy, we're going to stop at this point. But you
23 are planning on being back tomorrow anyway.

24 THE WITNESS: Yes, sir.

25 THE COURT: I'm afraid if you would just be
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1 back here at 8:30 to begin your testimony, we will
2 proceed at that time.

3 THE WITNESS: Yes, Your Honor.

4 THE COURT: And you may step down then.

5 THE WITNESS: Thank you.

6 THE COURT: I just want to talk with the
7 parties for a couple minutes about these exhibits.

8 (Witness excused at 5:49 p.m.)

9 THE COURT: 13, what was called 3A, so I guess
10 13A is admitted. 13B and 13C I will reserve on. And
11 for the record we'll now call 3A 13A, and 3B and 3C 13B
12 and C respectively.

13 Exhibit 12, the wet-batch product process I'm going
14 to reserve on.

15 14, 18 and 15 I would ask the parties to see if
16 they can reach some agreement on each of these summaries
17 with respect to portions that might be acceptable and
18 those I need to rule on tomorrow.

19 At the close of Mr. Kennedy's testimony, I will
20 give you rulings on each.

21 Anything more for the plaintiffs at this time?

22 MS. GEHRIG: Not at this time, Your Honor.

23 THE COURT: And you have additional witnesses
24 tomorrow; is that right?

25 MS. GEHRIG: We have --
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1 THE COURT: I'm sorry, I'm just talking about
2 liability at this point.

3 MS. GEHRIG: Your Honor, we just need to finish
4 with Mr. Kennedy and then we have one more.

5 THE COURT: Very good. Thank you. And
6 defendants anticipate completing their witnesses if we
7 begin at 10:30?

8 MR. BIANCHI: I think we could, yeah. We'll
9 have the witnesses here.

10 THE COURT: Then I would ask you to make that
11 effort. In following up on a question that was posed to
12 me, which is how we will go forward on damages, my
13 thought would be if we could get in the liability case,
14 it will give me a little time to consider it. But I
15 will try to give you an indication whether we're going
16 forward with damages right away so you'll know what
17 you'll need to prepare for on Wednesday. If it's close,
18 I'm going to take the damage testimony. If I know for
19 certain that once I lay out all my findings we're not
20 going to go forward, I'll tell you that. And obviously
21 if I think there's liability, I'll give you more
22 direction in that regard too.

23 But my hope would be to complete the evidence and
24 give you some guidance by the end of the day tomorrow
25 and then to proceed with damages on Wednesday if

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1 necessary.

2 Anything more for the defendant tonight?

3 MR. BIANCHI: No, Your Honor.

4 THE COURT: All right. Then unless there's
5 something more from either side, we will adjourn for the
6 day and I will see you at 8:30 tomorrow morning to
7 continue with trial. You're free to move about.

8 MS. GEHRIG: Thank you, Your Honor.

9 (Proceedings concluded at 5:51 p.m.)

10

11 * * * * *

12 I, LYNETTE SWENSON, Certified Realtime and
13 Merit Reporter in and for the State of Wisconsin,
14 certify that the foregoing is a true and accurate record
15 of the proceedings held on the 15th day of June 2015
16 before the Honorable William M. Conley, Chief Judge for
the Western District of Wisconsin, in my presence and
reduced to writing in accordance with my stenographic
notes made at said time and place.
Dated this 16th day of July 2015.

17

18 /s/_____

19 Lynette Swenson, RMR, CRR
20 Federal Court Reporter

21

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